S. HRG. 99-518

HABEAS CORPUS REFORM

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 238

A BILL TO REFORM PROCEDURES FOR COLLATERAL REVIEW
OF CRIMINAL JUDGMENTS, AND FOR OTHER PURPOSES

OCTOBER 8, 1985

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HABEAS CORPUS REFORM—S. 238

TUESDAY, OCTOBER 8, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:37 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Leahy, Heflin, and Grassley.

Staff present: Diana L. Waterman, general counsel; John Podesta (Senator Leahy's staff); Eddie Correia (Senator Metzenbaum's staff); Bill Miller (Senator Laxalt's staff), and Peggy Mainor (Senator Heflin's staff).

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The committee will come to order.

I understand that the chairman is not going to be here, nor anybody else. I am pleased to participate in these hearings. They are important, and the chairman and other members also feel they are important. I should point out that they are not here because Senator Dole has called an extraordinary meeting, something that was not in the control of the chairman and certainly not anticipated when he asked people to be here. And I know that if he could, he would very definitely want to be here.

As a former prosecutor, I share the views of many on this committee that our rules of habeas corpus are in need of reform. The delay in finality of criminal cases caused by thousands of frivolous claims concerns all of us.

I have long felt that a true deterrent to crime is first an understanding by the perpetrator of a crime that he or she will be apprehended soon after the crime, that they will be tried expeditiously at a time thereafter, and if they are convicted, they will be given the right of appeal. The appeal will be heard, again expeditiously, and decided either in their favor or against them. If it is decided against them, then that is the end of it—the sentence will start. Cases that go on and on and on and on and on again in appeals, so many of them frivolous, so many of them repetitious, so many of them raising the same issues, do not deter crime. Nor, in those rare circumstances where rehabilitation is actually possible within our prison system, do these delays help. So long as a person is in prison and thinks that the sole issue is whether there should be one more paragraph in an appeal or habeas corpus petition, he or she tends not to focus at all on their reason for being there in the first place. After a while, the whole question is, "Did my lawyer wear the wrong apparel on the day of the summation? Did he say the wrong thing?" Or maybe an item of evidence that we might have put in, even though we may have decided not to put it in for a particular reason during the trial, should have been put in, and so on.

I well remember cases—in fact, I still read in the paper of cases that I prosecuted 15, 16 years ago, where convictions were obtained, appeals were held and convictions were sustained, that are still going around and around and around in the court system. Every 3 months they will come up, and every 3 months thereafter, they will be dismissed.

Now, the right of Federal review of Federal rights of State prisoners has been firmly established in this country since 1867, and any attempt to change the substance of that right should be considered with great caution.

This bill contains a provision that would, in fact, repeal the substance of Federal habeas corpus jurisdiction. If enacted, it would in the words of one well-known professor of constitutional law, "make the most drastic revision of the judicial system for enforcing constitutional rights that any act of Congress has made since Reconstruction."

I strongly oppose this provision, mislabeled "reform", which is so destructive of a jurisdiction the Federal courts have had for almost 120 years.

I have already stated my concern about the nonfinality of criminal cases, so I would point out that at the same time, this bill contains proposals which address legitimate concerns. The statute of limitations, the requirement that a petitioner show actual prejudice in order to raise a claim in Federal court that he failed to raise in State court; a presumption that State court determinations of factual issues are correct, and other time-saving measures, are all good proposals and should be adopted in some form.

While I do not agree with everything they contain, I am prepared to work with the sponsors on this committee to reach agreement on the precise language.

I have been working on specific changes to this bill which I believe would improve it. I would like the opportunity to present these suggestions to the Justice Department in the next couple of days. I would hope that they might have the time to listen to them. I would hope that the Justice Department will have an opportunity to comment on my suggestions before the committee votes on the bill. And I would recommend that the committee hold up this vote until they have a chance to hear those comments from the Justice Department.

I would point out that it is not my intention to delay action on this issue, because everyone agrees that some reform is needed. But I do not believe this bill as written should be or will be enacted into law. It has to go through not only this body, but the House, and I am prepared to work on language that the majority of both Houses can support. I think that is going to be necessary if we are ever going to get it out of the conference committee.

Before I call the first witness, I wish to place a copy of S. 238 and a statement by Senator Denton into the record.

[Aforementioned follows:]

II

99TH CONGRESS
1ST SESSION

S. 238

To reform procedures for collateral review of criminal judgments, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day JANUARY 21), 1985

Mr. THURMOND (for himself, Mr. LAXALT, Mr. HATCH, Mr. DECONCINI, Mr. SIMPSON, Mr. ABDNOR, Mr. CHILES, Mr. DOMENICI, Mr. HELMS, Mr. LONG, Mr. NUNN, Mr. DENTON, Mr. COCHRAN, Mr. TRIBLE, Mr. D'AMATO, Mr. EAST, and Mr. BOREN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To reform procedures for collateral review of criminal judgments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Reform of Federal Intervention in State Proceedings Act of 1985".

SEC. 2. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 3. Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a

State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 4. Federal Rule of Appellate Procedure 22 is amended to read as follows:

"RULE 22.

"HABEAS CORPUS AND § 2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

SEC. 5. Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)", respectively, and is further amended—

(a) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.";

(b) by redesignating subsection "(d)" as subsection "(e)", and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence."; and

(c) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.".

SEC. 6. Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SERVED AS A MEANS FOR THE LOWER FEDERAL COURTS TO REVIEW STATE CRIMINAL JUDGMENTS ON THE GROUNDS OF ALLEGED DEPRIVATION OF FEDERAL RIGHTS. IN FACT, THE NUMBER OF PRISONERS CHALLENGING THE VALIDITY OF THEIR STATE FEDERAL HABEAS CORPUS PETITIONS ROSE NEARLY 700 PERCENT FROM 1961 THROUGH 1982, ACCORDING TO A REPORT PREPARED BY THE BUREAU OF JUSTICE STATISTICS. IT IS THAT APPALLING SITUATION THAT THIS BILL IS DESIGNED TO REDRESS.

ACCORDING TO OUR COUNTRY'S LEADING LEGAL SCHOLARS ON FEDERAL PROCEDURE, THE SINGLE MOST CONTROVERSIAL AND FRICTION-PRODUCING ISSUE IN THE RELATIONSHIP BETWEEN THE FEDERAL COURTS AND THE STATES IS FEDERAL HABEAS CORPUS FOR STATE PRISONERS. STATE COURTS RESENT HAVING THEIR DECISIONS REVIEWED BY FEDERAL JUDGES, WHO IN TURN ARE UNHAPPY ABOUT THE BURDEN OF REVIEWING THOUSANDS OF MOSTLY FRIVOLOUS PETITIONS.

SEVERAL SUPREME COURT JUSTICES HAVE STRONGLY CRITICIZED THE CURRENT SYSTEM OF FEDERAL HABEAS CORPUS, AND HAVE CALLED FOR BASIC LIMITATIONS ON ITS SCOPE AND AVAILABILITY. CHIEF JUSTICE BURGER HAS URGED CONGRESS TO CONSIDER RESTRICTING THE AVAILABILITY OF FEDERAL HABEAS CORPUS FOR STATE PRISONERS BECAUSE, IN HIS VIEW, "THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY IS BOGGED DOWN WITH LACK OF FINALITY OF JUDGMENTS IN CRIMINAL CASES." AS JUSTICE POWELL OBSERVED OVER TEN YEARS AGO IN HIS OPINION IN SCHNECKLOTH V. BUSTAMONTE:

> THE PRESENT SCOPE OF HABEAS CORPUS TENDS TO UNDERMINE THE VALUES INHERENT IN OUR FEDERAL SYSTEM OF GOVERNMENT. TO THE EXTENT THAT EVERY STATE CRIMINAL JUDGMENT IS TO BE SUBJECT INDEFINITELY TO BROAD AND REPETITIOUS FEDERAL OVERSIGHT, WE RENDER THE ACTIONS OF STATE COURTS A SERIOUS DISRESPECT IN DEROGATION OF THE CONSTITUTIONAL BALANCE BETWEEN THE TWO SYSTEMS.

IT IS TO THAT VERY PROBLEM, SO ELOQUENTLY EXPRESSED BY DISTINGUISHED SUPREME COURT JURISTS, THAT THIS BILL IS ADDRESSED.

THE BILL ESTABLISHES A STANDARD FOR REVIEWING HABEAS CORPUS PROCEEDINGS BY ACCORDING DEFERENCE TO STATE ADJUDICATIONS THAT

ARE "FULL AND FAIR." THAT WOULD BE A VAST IMPROVEMENT OVER THE CURRENT RULES, WHICH PROVIDE, THROUGH HABEAS CORPUS PROCEEDINGS, FOR MANDATORY READJUDICATION, AND THAT FREQUENTLY RESULT IN DUPLICATIVE RELITIGATION OF CLAIMS THAT HAVE ALREADY BEEN FAIRLY CONSIDERED BY STATE TRIAL AND APPELLATE COURTS.

THE BILL ALSO WOULD RESOLVE THE MAJOR UNCERTAINTIES ABOUT ACCESS TO FEDERAL COLLATERAL REMEDIES AFTER A FAILURE TO RAISE A CLAIM PROPERLY IN NORMAL CRIMINAL PROCEEDINGS. IT DOES THAT BY ESTABLISHING "CAUSE AND PREJUDICE" AS THE EXCLUSIVE GOVERNING STANDARD.

IN ADDITION, THE BILL WOULD ESTABLISH A ONE YEAR TIME LIMIT ON ACCESS TO FEDERAL HABEAS CORPUS FOR STATE PRISIONERS, NORMALLY RUNNING FROM THE TIME STATE REMEDIES ARE EXHAUSTED. FOR SIMILAR PURPOSES, IT WOULD PRESCRIBE A TWO-YEAR TIME LIMIT ON APPLICATIONS FOR COLLATERAL RELIEF BY FEDERAL PRISONERS, NORMALLY RUNNING FROM FINALITY OF JUDGMENT.

THE BILL ALSO ADDRESSES TWO TECHNICAL ISSUES THAT NEED TO BE REMEDIED. FIRST, IT WOULD MAKE IT CLEAR THAT HABEAS CORPUS PETITION CAN BE DENIED ON THE MERITS, NOTWITHSTANDING THE PETITIONER'S FAILURE TO EXHAUST AVAILABLE STATE REMEDIES. THAT CHANGE WOULD ELIMINATE THE WASTE OF TIME AND EFFORT THAT CURRENTLY OCCURS WHEN A FRIVOLOUS PETITION IS DISMISSED BY A FEDERAL COURT ON GROUNDS OF NON-EXHAUSTION OF STATE REMEDIES BUT IS LATER BROUGHT BACK TO FEDERAL COURT FOLLOWING ITS UNSUCCESSFUL PRESENTATION.

SECOND, THE BILL WOULD CHANGE THE CURRENT RULE THAT GIVES A STATE PRISONER IN A HABEAS CORPUS PROCEEDING REPEATED OPPORTUNITIES TO PERSUADE A FEDERAL DISTRICT JUDGE AND THEN A CIRCUIT JUDGE THAT AN APPEAL IS WARRANTED. SIMILARLY, IT WOULD

BRING THE PROCEDURE GOVERNING ACCESS TO APPEAL IN COLLATERAL PROCEEDINGS INVOLVING FEDERAL PRISONERS INTO LINE WITH THE PROCEDURE EMPLOYED FOR HABEAS CORPUS PROCEEDINGS FOR STATE PRISONERS.

I BELIEVE THAT THE REFORM OF FEDERAL INTERVENTION IN STATE PROCEEDINGS ACT OF 1985 REPRESENTS A RATIONAL, REASONED APPROACH TO A PROBLEM THAT HAS BEEN DEVELOPING FOR MORE THAN A CENTURY, A PROBLEM SO GREAT THAT IT HAS LED OUR COUNTRY'S LEADING JURISTS TO ASK US FOR SPECIFIC LEGISLATIVE RELIEF.

MR. CHAIRMAN, I COMMEND FOR YOU FOR YOUR LEADERSHIP ROLE IN INTRODUCING THIS NECESSARY PIECE OF LEGISLATION AND I URGE MY COLLEAGUES TO SUPPORT THE BILL IN ORDER TO FACILITATE THE ABILITY OF OUR JUDICIAL SYSTEM TO DISPENSE JUSTICE TO ALL OUR CITIZENS INSTEAD OF UNNECESSARILY WASTING TIME AND EFFORT ON A FEW PEOPLE WHO EXPLOIT PROCEDURAL LOOPHOLES IN THE LAW.

THANK YOU, MR. CHAIRMAN.

Senator LEAHY. With that, why don't we start with Mr. Trott, the Assistant Attorney General of the Criminal Division, U.S. Department of Justice.

Mr. Trott, it is always good to have you here before the Judiciary Committee. We have your statement, which will be made a part of the record.

Mr. TROTT. Thank you, Mr. Chairman.

Senator LEAHY. I might say, in your summary, if you could address yourself first to this question. I have been told that close to 90 percent of all habeas claims are dismissed without a hearing. I wonder how many of these claims are frivolous, and what this bill would do to reduce the number of frivolous claims filed?

STATEMENT OF STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. TROTT. Thank you, Mr. Chairman.

I am very pleased to present the views of the Department of Justice on the habeas corpus reform proposals of S. 238. As you know, this committee has exhaustively examined these proposals over the past several years, and in February 1984, they were passed by a full Senate vote of 67 to 9.

In our view, support for this legislation is an essential part of the Criminal Justice Reform Program of the Department of Justice and the administration.

In my remarks today, with your permission, I will briefly discuss the history of Federal habeas, the problems caused by——

Senator LEAHY. Mr. Trott, because of these meetings going on, we may well have to adjourn early. Some of us from this side of the aisle will also have to vote at some point on the budget matters. We want the checks to keep flowing, to the Department of Justice and everywhere else, and I may well have to leave. I know the history, and I have read your prepared statement. I appreciate it.

But back again to the question: If 90 percent of all habeas claims are dismissed without a hearing, how many of those claims would you say are frivolous, and what would your bill do to reduce the number of frivolous claims filed?

I am sorry to cut you off. I want you to have a chance to be able to state the Department's position on this, and I do not want you or the other witnesses here to be deprived of the chance to be able to state your positions.

Mr. TROTT. I believe that the bill as it is presently drafted would reduce drastically the numbers of frivolous claims that are filed, and it is my view that the overwhelming number of the petitions for writ of habeas corpus filed by State prisoners in Federal court are, in fact, frivolous and trivial, involving matters that have previously been decided fairly and fully under the laws and the Constitution of the United States, and represent nothing more than the recreational activity of idle prisoners who have essentially nothing to do while they are in prison except look for another way to either get on a proper status or to pursue claims that have no status to them.

The current system has been characterized by a number of our most notable judges in the system as a gigantic waste of time, producing nothing for the effort expended.

However, there is an enormous effort that has to be expended to process these claims, and not only on the part of the Federal System, but also on the part of the States where these claims come from.

It is my view that the three main elements of this bill which would limit these claims to a particular period of time, cut down claims that had not been properly raised before, and then give due deference to the State, would eliminate the lion's share of these petitions that now clog our courts.

Every study that has been done, some of which are referred to in my statement, and every commentator who has worked with this system for some period of time views the overwhelming number of these charges as simply trivial.

Senator LEAHY. What do you see in the bill that will reduce the number of frivolous claims? You mentioned the recreational aspects, and I tend to agree with you that a great number of the petitions that I saw in my own experience really had to fall into the recreational category. They tended to drop off during the World Series and the NFL Playoffs, but the rest of the time they were pretty extensive. That is not to say that there were not some valid ones that would come in.

But what specifically does the bill do to reduce the number of frivolous claims?

Mr. TROTT. First, the time limit. It gives a person only 1 year from the exhaustion of remedies at the State level to bring such a charge. Right now, we have many, many claims brought 5, 10, and I am even told in some instances as long as 50 years after the original adjudication of guilt.

So, by putting a limit of 1 year right then and there, we make people face up to the reality of what they have to do, and by saying after a year we are not going to have any more of these, we cut down the kinds of people who sit in prison and just file another one or another one or another one.

Finally, I think one of the most important aspects of this is that the bill would accord deference to the result of a State court's full and fair adjudication of the petitioner's claims. As the legislative history of this proposal explains, the "full and fair" standard would normally be satisfied if the State court determination was reasonable and was arrived at by procedures consistent with due process.

Unfortunately now, we see that a lot of these are simply differences of opinion between Federal courts and State courts.

Senator LEAHY. Let's explore that a bit. I also again feel that great deference, in fact overwhelming deference, should be given to a State court's finding of fact either by jury or by a judge, rather than readjudicating those facts. But some have said—and reading this, I am troubled that indeed they are right—that this bill would end the right of Federal courts to review the Federal claims of State prisoners if the State decision was wrong, as long as there had been a fair hearing in State court.

Do you read the bill as doing that?

Mr. **Trott**. Not necessarily, but Mr. Chairman, I think that it is fair to state that——

Senator **Leahy**. Well, do you think it leans that way?

Can it be said that this bill would end the right of Federal courts to review the Federal claims of State prisoners, even if the State decision was wrong, as long as there was a fair hearing in State court?

Mr. **Trott**. Well, I certainly would hope that it would curtail that, and the reason I say that is because there is absolutely no evidence right now of a current insensitivity on the part of State court systems to Federal rights and claims.

Senator **Leahy**. Would this mean that no matter how fundamental the constitutional right involved, no matter how incorrect the State court decision, the person has to remain in prison without a new trial?

Mr. **Trott**. If there is a Federal issue, the Federal issue can be pursued as a matter of appeal. It does not have to necessarily be brought up on a write of habeas corpus. That is, I think, the point.

Senator **Leahy**. Well, suppose the appeals are over.

Mr. **Trott**. Already been adjudicated in Federal court? Then, why are we wasting time with a habeas corpus?

Senator **Leahy**. No, no. I am saying it is all over, but there has been a Federal issue involved. Can we constitutionally write into this bill something that would ban a Federal court from ignoring violations of constitutional rights?

Mr. **Trott**. I think you can, in the sense that those Federal questions ought to be pursued where appropriate on a Federal track.

Senator **Leahy**. How would that be if it is a State court?

Mr. **Trott**. As a matter of appeals on Federal questions from State criminal convictions, including to the U.S. Supreme Court.

Senator **Leahy**. Well, the U.S. Supreme Court hears one in how many cases that reach it? Federal habeas corpus petitions are all going to be at least reviewed; is that it, even if 90 percent of them are denied?

Mr. **Trott**. Well, reviewed, in the sense that—all right, I guess, reviewed.

Senator **Leahy**. I see. Is a Federal appeal really a valid option? How many times does somebody appeal a Federal issue in a Federal court from a State conviction?

Mr. **Trott**. I do not have the figures, but I know that the avenue is open, and it is available, so it is not like we are cutting off the opportunity to review Federal questions at a State level. But I think what happens here is that in a situation where there is no evidence of insensitivity in the State courts to these types of issues, all we are simply providing is another bite at the apple for people who do not have anything to do.

And the bill as it is currently drafted says that if the matter has been appropriately attended to, you give full deference to the State court. Now, I think there is latitude in there for a Federal court, if it examines a case and finds that a Federal issue has been given short shrift, to determine that there has not been a fair hearing on this issue to the person in question, so I think we ought to——

Senator **Leahy**. Oh, I am not saying short shrift at all. Let us just say they are plain wrong on it. Let us say you have, for example, a State judge who, instead of reading his law books, may have been listening to Attorney General Meese say that Supreme Court decisions are unworthy of respect, or suggesting that the Constitution does not apply to the States. He may have been very fair, but he followed the Attorney General's interpretation of the Constitution, which everybody might agree was dead wrong.

What do you do then?

Mr. **Trott**. Senator, under this bill, there would be sufficient latitude for a Federal court to move in and to not accord deference to that type of determination.

The legislative history of this proposal explains, as I indicated before, that the "full and fair" standard is normally satisfied if the State court determination was reasonable and was arrived at by procedures consistent with due process.

So even if you had procedures that were consistent with due process, if it was the determination of the Federal court that the determination itself was unreasonable, the writ would lie.

That is my reading of it.

Senator **Leahy**. So in other words, if it did not square with the Constitution, that would be per se unreasonable?

Mr. **Trott**. I would think we could easily find a factual situation where that would be the case and where the Federal court would be well-justified in saying we are not going to pay deference to the result of the State court's adjudication of these issues, because the determination was unreasonable in that it was flat wrong; it flew right in the face of Federal cases or precedent, or Federal rules, regulations or procedures.

Senator **Leahy**. But there is no "reasonableness" standard written in the bill, is there?

Mr. **Trott**. Well, the legislative history makes it very clear that the "full and fair standard"——

Senator **Leahy**. Yes, but it is not in there. Wouldn't it be just simpler to not write in anything that would even give the appearance of precluding a Federal court from determining Federal constitutional issues?

Mr. **Trott**. I do not think it gives that appearance at all, Senator, with all due deference. I think it——

Senator **Leahy**. I am asking the question. I am not arguing the point. I am only asking the question.

You don't think it does?

Mr. **Trott**. No.

Senator **Leahy**. OK.

Mr. **Trott**. "Full and fair" means "full and fair." And if a Federal judge decides it was not full, and it was not fair, the writ would possibly lie.

It is not our intention to cut this remedy off, to eliminate it, to restrict access to the Federal courts in situations that are unfair to the rights of the person involved. But we think that the description of what the attitude of the Federal courts ought to be visa-vis the determination of these issues by the State court accurately provides for the kind of latitude that is necessary to preserve the writ.

Senator **Leahy**. What about just a statute of limitations which begins after the exhaustion of State remedies. Why wouldn't that take care of everything?

Mr. TROTT. Well, because you still have 1 year during which people will file all kinds of these writs, and so you are still burdened with possibly 8,000 of these cases.

Senator LEAHY. Well, we are burdened with them, but we stop them after a year.

Mr. TROTT. One of the elements that has changed over the years is the access to counsel. Years ago, you found many people in systems, in States, probably in one respect or another, not fully represented by counsel.

Now, I would hazard a guess that in every State, by the time there has been a complete adjudication of all claims in a criminal case, there has been in all stages of the proceeding, including appellate stages, adequate counsel, so that these issues have been clearly explored, fully briefed, and they should be absolutely ready to go.

Nonetheless, I do not think that they are all eliminated simply by saying 1 year, because since they are ready to go, many people will say, "Well, what do we have to lose? Let's file it in Federal court."

I think you need both approaches to eliminate the problems that we have identified in our statement. If you just have a year, you will still have a lot of these petitions filed, and I think that it is an additional tool in the weaponry of the courts to say that deference should be paid to the result of——

Senator LEAHY. Even with this bill, the frivolous petition could still be filed, isn't that correct? I mean, there is nothing here to stop somebody from filing a petition for a writ of habeas corpus.

Mr. TROTT. That is true. It is not a crime to file a writ of habeas corpus.

Senator LEAHY. That is what I mean. In other words, the Federal courts may still receive the same 8,000 habeas petitions each year.

Mr. TROTT. The bill itself, in order to protect Federal rights, has exceptions. Failure to raise the claim properly or to have it heard in the State proceeding if it was the result of a State action in violation of the Constitution or laws of the United States, the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable, or the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural defect. So the language of the bill itself recognizes certain situations in which we have spelled out exceptions to the ordinary rule, in an attempt to preserve the ability to raise Federal rights where there is a need for that to be done.

Senator LEAHY. Mr. Trott, I appreciate your testimony. We will have other questions in writing, and I will also leave the record open so that the chairman, or anybody else on the committee, can submit questions. And again, I express the chairman's apologies to you. It is only because of the extraordinary remedy pending over in the "puzzle palace," 100 yards or so from here, that he is not here.

We are preparing, all 100 of us, for our day in the "Cave of the Winds."

So, I appreciate you being here.

Mr. TROTT. Mr. Chairman, I appreciate the sentiments, and we thank you for the opportunity to appear. Any questions that you direct to us, we will answer within 24 hours and get back to you immediately.

Senator **Leahy**. I will have some, and as I said earlier, there is much in the bill that I do approve of. Based on my own experience, I think reform is necessary. But I am concerned very much with anything that might directly or indirectly preclude the Federal courts from reviewing a Federal constitutional right, and I will have some people from my office get in touch with the Justice Department and see if there is an area—as I will be doing with other members of the subcommittee—where we might reach agreement on that. I do think that habeas corpus reform, or at least procedural reform, is needed. I want to make sure, however, that we do not preclude what is such a very, very basic right for all Americans—and I am sure you feel the same way.

Mr. **Trott**. Thank you.

Senator **Leahy**. Thank you, Mr. Trott.

[Statement and responses to written questions from Senators Leahy and Biden follow:]

Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 238, HABEAS CORPUS REFORM

ON

OCTOBER 8, 1985

Mr. Chairman and Members of the Committee:

I am pleased to appear today to present the views of the Department of Justice on S. 238, a bill to reform procedures for the collateral review of criminal judgments. We regard the enactment of this legislation as an essential part of the criminal law reform program of the Department of Justice and the Administration.

As you know, this Committee has exhaustively examined the need for reform in federal habeas corpus, and the specific proposals of this bill, over the past several years. Last year, the full Senate passed an identical bill, S. 1763, by a vote of 67 to 9. We have already testified at length on these proposals in the past two Congresses. 1/ My remarks today will consist of a brief review of the history of federal habeas corpus, a statement of the problems engendered by its contemporary character, and an analysis of the specific reforms proposed in S. 238 as a response to those problems.

1/ Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 8, 16-17, 32-41, 160-65 (1983); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 16-107 (1982).

I. The History of Federal Habeas Corpus

Federal review of the judgments of state courts has traditionally been limited to review in the Supreme Court. The contemporary habeas corpus jurisdiction of the federal courts is a unique exception to this principle, under which the lower federal courts can review and overturn the judgments of state courts in criminal cases. The relevant history shows that Congress never decided to give the lower federal courts this extraordinary power, and that it has no basis in the Constitution and no deep roots in our history. Its existence is essentially the result of judicial innovations that occurred in the 1950's and 1960's.

At common law, habeas corpus was a means of securing judicial review of the existence of grounds for executive detention. If a person was taken into custody by executive authorities, he could petition a court to issue a writ of habeas corpus, which would order the custodian to produce the prisoner and state the cause of his commitment. If the government responded that the petitioner was being held on a criminal charge, the court would set bail for the petitioner, or order him recommitted pending trial, depending on whether the offense charged was bailable or non-bailable. If the government could state no charge against the petitioner, the court would order his release. 2/

The importance of habeas corpus in this character -- as a safeguard against arbitrary executive detention -- was recognized by the Framers, who included in the Constitution a prohibition of suspending the writ of habeas corpus, except in cases of invasion or rebellion. The writ of habeas corpus referred to in the Suspension Clause of the Constitution, however, differed in two fundamental respects from the contemporary writ addressed by S. 238:

First, the right to habeas corpus set out in the Constitution was exclusively intended as a check on abuses of authority by the federal government, and was not meant to provide a judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no

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2/ See R. Rader, Bailing Out a Failed Law: The Constitution and Pretrial Detention in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 91, 94-96 (1983); Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich. L. Rev. 451 (1966).

right to habeas corpus. 3/ Shortly after the ratification of the Constitution, the First Congress in 1789 made the limitation of the federal habeas corpus right to federal prisoners explicit, providing in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81-82):

> [T]he justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol [i.e., jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same....

Second, the writ referred to in the Constitution, as noted above, was the common law writ of habeas corpus, whose function was limited to serving as a check on arbitrary executive detention and as a pretrial bail-setting mechanism. The Framers' recognition of the common law scope of the writ is evident in the language of the Constitution itself and the First Judiciary Act. The Constitution authorized suspension of the writ in cases of rebellion or invasion so as to permit in such circumstances executive detention unconstrained by normal legal processes and standards. 4/ The First Judiciary Act described the function of

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3/ See generally 2 M. Farrand, The Records of the Federal Convention of 1787, at 438 (1966); 3 id. at 157, 213, 290 (assumption in debate at the Constitutional Convention that the states would retain the authority to suspend the writ).

4/ See generally id.; 1 Blackstone, Commentaries on the Laws of England 131-32 (1765).

the writ as "inquiry into the cause of commitment" and referred to its availability to federal prisoners "committed for trial".

The restriction of federal habeas corpus to federal prisoners was qualified by the enactment of the Habeas Corpus Act of 1867, which extended the availability of the writ to persons "restrained of ... liberty" in violation of federal law, without any requirement of federal custody. The legislative history of the Act indicates that it was meant to provide a federal remedy for former slaves who were being held in involuntary servitude in the states in violation of the wartime emancipation decrees and the recently enacted Thirteenth Amendment. 5/ While this narrow purpose was lost sight of in subsequent judicial interpretations of the Act, the early decisions continued to give a limited scope to federal habeas corpus, following the common law rule that habeas review of judicially imposed detention is limited to the question of whether the judgment was void because the committing court lacked jurisdiction.

In later cases, however, a gradual expansion of the scope of federal habeas corpus through caselaw development took place, based on the fiction that sufficiently serious defects in state proceedings would deprive the state court of jurisdiction and accordingly permit federal habeas review under the

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5/ See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965).

traditional standards. This fiction eventually reached the breaking point and was abandoned by the Supreme Court in favor of an essentially appellate conception of habeas corpus. By the early 1960's, habeas corpus was established in its contemporary character as a mechanism by which state criminal judgments, following review and affirmance by the appellate courts of the state, can effectively be appealed to the federal trial courts for further review on federal grounds. 6/

II. The Problems of the Current System

Proponents of the current system of federal habeas corpus review have argued that it is necessary to guard against or correct injustices that would otherwise result from violations of federal rights by the state courts. Defenders of the current system also often emphasize the high regard in which the "Great Writ" has been held in the common law and American constitutional traditions, and suggest that so venerable an institution should not be tampered with lightly.

6/ See Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 483-501 (1963); William French Smith, Proposals for Habeas Corpus Reform in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 138-40 (1983) [hereafter cited as "Proposals for Habeas Corpus Reform"].

There is, however, no evidence that there is currently any general insensitivity to claims of federal right in the state courts; no evidence that direct review in the Supreme Court does not provide an adequate means of maintaining the uniformity and supremacy of federal law in state criminal cases as well as in state civil cases; and no evidence that federal habeas corpus has actually served in recent years to correct injustices occurring in state proceedings. A state prisoner who properly presents an application for federal habeas corpus has typically been tried and convicted of a serious offense in state court, has already had the conviction affirmed by a state appellate court on appeal, and has had an application for review denied or decided adversely by a state supreme court. Many habeas petitioners have also had additional review in state collateral proceedings. 7/ The incremental benefits of affording even more levels of mandatory review in the lower federal courts through habeas corpus are difficult to discern. In most habeas cases the federal courts agree with the conclusion of the state courts, though considerable time and effort at both the district court and circuit court levels is often expended in reaching this result. In the relatively few cases in which relief is granted, it is likely to reflect disagreement with the state courts on arguable or unsettled issues in the interpretation or application of

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7/ See Proposals for Habeas Corpus Reform, supra note 6, at 142.

federal law on which the lower federal courts may disagree among themselves. 8/

The questionable value of this type of review is emphasized by the experience of the District of Columbia, in which federal habeas corpus has been abolished. As a result of legislation enacted in 1970, prisoners in the District of Columbia cannot seek habeas corpus review in the federal district courts, but are limited to a collateral remedy in the local court system. 9/ We are unaware of any adverse effect on the quality or fairness of proceedings in the District of Columbia courts resulting from this restriction. When the abolition of federal habeas corpus in one major jurisdiction has caused no evident problems over a period of fifteen years, it becomes difficult to believe that the more modest reforms proposed in S. 238 would adversely affect the quality of justice in the substantially similar judicial systems of the states.

While the benefits of the current system of federal habeas corpus are, to say the least, nebulous, its costs are substantial and obvious. The exercise by individual federal

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8/ See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 165 & n.125 (1970).

9/ See Proposals for Habeas Corpus Reform, supra note 6, at 148-149; McGowan, The View From an Inferior Court, 19 San Diego L. Rev. 659, 667-69 (1982).

trial judges of the authority to review and overturn the considered judgments of state supreme courts is a perennial source of tension in the relationship of the federal and state judiciaries. While most habeas applications are wholly lacking in merit, they continue at a high level from year to year. In recent years they have accounted for about 8,500 filings annually in the district courts. Habeas corpus petitions, in common with other prisoner suits, are usually filed as a means of harassing the authorities, or as a form of recreational activity which passes the time in prison. The difficulty of dealing with these cases is increased by the absence of any definite time limit on habeas applications, which can result in the need to reconstruct events after a lapse of years or decades. A study funded by the Department of Justice in 1979, for example, found that 40 percent of habeas corpus petitions were filed more than five years after the state conviction, and nearly one-third were filed more than a decade after the state conviction. Still longer delays were noted in some cases in the study, up to more fifty years from the time of conviction. 10/

Federal habeas corpus has also been a major contributing factor in the endless litigation and re-litigation that has characterized state criminal cases involving capital

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10/ See Allen, Schachtman & Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L. J. 675, 703-04 (1982).

sentences. The possibility of moving such cases into federal court by applying for habeas corpus and securing last-minute stays of execution from federal judges has been an important weapon in the defense attorney's arsenal of delaying tactics, and has frustrated state efforts to implement fair and effective procedures for imposing and carrying out death sentences. 11/

Finally, the traditional reverence for the Great Writ provides no support for the continuation of federal habeas corpus in its present character as a third or fourth level of review for state criminal convictions. As noted earlier, this use of habeas corpus would have appeared totally alien to the Framers, and to common law jurists generally prior to the middle of the twentieth century. The same consideration is a sufficient response to supposed constitutional problems that have been alleged by opponents of the reforms proposed in S. 238. The writ whose operation would be affected by S. 238 -- a quasi-appellate mechanism for reviewing state criminal judgments -- is simply not the writ referred to in the Constitution.

11/ See Proposals for Habeas Corpus Reform, supra note 6, at 145-46.

III. The Reforms Proposed in S. 238

S. 238 incorporates a moderate and balanced set of reforms addressed to the clearest abuses of the existing system of habeas corpus review. The specific reforms proposed in the bill are as follows:

First, as noted above, there is no definite time limit on habeas corpus applications. This is in marked contrast to other areas of federal criminal procedure, in which it is consistently recognized that limitation periods are essential for ensuring a reasonable degree of finality in criminal judgments. For example, state prisoners' applications for direct review of their convictions in the Supreme Court are subject to a normal 90 day limit, and motions for a new trial by federal prisoners based on newly discovered evidence are subject to a two year limitation period under Federal Rule of Criminal Procedure 33. S. 238 would similarly provide for a one-year time limit on habeas corpus applications by state prisoners, normally running from exhaustion of state remedies, and a two-year limit on collateral attacks by federal prisoners, normally running from finality of judgment. The need for such reforms has cogently been expressed by Justice Lewis F. Powell:

> Another cause of overload of the federal system is 28 U.S.C. § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of

> justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy. 12/

A second reform of the bill addresses the problem of claims that were not properly raised in state proceedings. It would establish a general rule barring the assertion in federal habeas corpus proceedings of a claim that was not properly raised before the state courts, so long as the state provided an opportunity to raise the claim that satisfied the requirements of federal law. The main practical import of the proposed rule is for cases in which attorney error or misjudgment is advanced as the reason why a claim was not raised in the state courts, resulting in its forfeiture under state rules of procedure. A procedural default of this sort would be excused in a subsequent habeas corpus proceeding if the attorney's actions amounted to constitutionally ineffective assistance of counsel, since the default in such a case would be the result of the state's failure, in violation of the Sixth Amendment, to afford the defendant effective assistance of counsel. 13/ But lesser oversights or misjudgments -- which even the most able attorney will sometimes engage in, given the pressures and complexity of criminal adjudication -- would not be grounds for re-opening a

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12/ Address before the A.B.A. Division of Judicial Administration, Aug. 9, 1982.

13/ See Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

criminal case in federal court. 14/ As Justice O'Connor stated for the Supreme court in Engle v. Isaac:

> Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit ... [a particular] ... argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available ... the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. 15/

A third major reform of S. 238 is affording finality to "full and fair" state adjudications of a petitioner's claims. Justice O'Connor has observed:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give

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14/ The bill would apply the same standard -- constitutional ineffectiveness -- to claims in collateral attacks by federal prisoners that a procedural default should be excused because of counsel error. The Supreme Court has recognized that the grounds for excusing procedural defaults in collateral proceedings should be no more permissive in relation to federal prisoners than in relation to state prisoners. See United States v. Frady, 456 U.S. 152, 166 (1982).

15/ 456 U.S. 107, 133-34 (1982).

> finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court. 16/

As the legislative history of the proposal explains, the "full and fair" standard would normally be satisfied if the state court's decision of the petitioner's claims was reasonable in it determinations of law and fact, and was arrived at by procedures consistent with due process. 17/ The proposed standard may be compared to that applied in habeas corpus proceedings prior to the unexplained substitution of the existing rules of mandatory re-adjudication in decisions of the 1950's and 1960's. In the period preceding those innovations it was recognized that federal habeas corpus should not be a routine avenue of appellate review of state criminal judgments, but should be reserved for extraordinary cases involving a serious defect in state processes. In the decision of Ex Parte Hawk in 1944, for example, the Supreme Court stated:

> Where the state courts have considered and adjudicated the merits of ... [a petitioner's] ... contentions ... a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated .... But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy ... or because in the particular case the remedy afforded by state law proves in practice unavailable or

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16/ Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William and Mary L. Rev. 801, 814-15 (1981).

17/ See S. Rep. No. 226, 98th Cong., 1st Sess. 24-27 (1983).

> seriously inadequate ... a federal court should entertain his petition for habeas corpus, else he would be remediless.[18]

Finally, S. 238 would institute reforms recommended by Judge Henry Friendly[19] and Professor David Shapiro[20] in the procedure on appeal in collateral proceedings and the operation of the exhaustion requirement. These reforms will improve the efficiency of habeas corpus proceedings and reduce the litigating burdens presently associated with them.

* * *

In sum, the writ of habeas corpus that currently burdens the courts, vexes federal-state relations, and defeats the ends of criminal justice is not the writ of habeas corpus that was esteemed by the founders of our nation and accorded recognition in the Constitution. The diversion of the Great Writ from its historic function is the source of its current disrepute and the problems it has engendered. The reforms proposed in S. 238 would go far toward correcting the major deficiencies of the present system of federal habeas corpus in terms of federalism, proper regard for the stature of the state courts, and the needs of criminal justice.

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[18] 321 U.S. 114, 118 (1944).

[19] *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 144 n.9 (1970) (access to appeal in collateral proceedings).

[20] *See* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 358-359 (1973) (exhaustion of state remedies should not be prerequisite to denial of claims on the merits).

I would be pleased to answer any questions the Committee may have.

SENATOR PATRICK LEAHY
QUESTIONS FOR STEVEN TROTT
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE
SENATE JUDICIARY COMMITTEE
HEARING ON S.238
OCTOBER 8, 1985

1. I understand that of the approximately 8000 habeas corpus petitions filed each year, 96% are dismissed without a hearing, and that most of these are frivolous. What would S.238 do to reduce the total number of petitions filed each year?

2. What is the average amount of time spent by judges, magistrates and/ or lawclerks to review and dismiss each of these petitions?

3. How many of the 8000 petitions are granted? How many of those prisoners are retried in state court?

4. How many petitions receive an evidenciary hearing each year? How much court time is spent on the average on each petition that requires a hearing?

5. How many petitioners whose petitions are dismissed without a hearing had the assistance of counsel in preparing their petitions?

6. How many petitioners who receive hearings are represented by counsel at the hearing?

7. According to the Bureau of Justice Statistics Special Report on Habeas Corpus, between 1970 and 1982 the state prisoner population increased from 176,391 to 384,689. During that same period, the number of habeas petitions filed by state prisoners decreased rom 9,063 to 8,059. How do you explain this?

8. On what, besides the number of frivolous petitions, do you base your statement that habeas petitions are "usually filed as a means of harassing the authorities"?

9. In your prepared statement, you stated there is "no evidence that there is currently any general insensitivity to claims of federal right in the state courts . . . no evidence that federal habeas corpus has actually served in recent years to correct injustices occurring in state proceedings." Is it true that the following cases would not have been subject to review on the merits by federal habeas courts if S.238 had been in effect?

Farmer v. Harris, 84 Civ. 1482 (S.D.N.Y. 1985)
Clark v. Blackburn, 632 F.2d 531 (5th Cir, 1981)
Peek v. Kemp, 746 F.2d 672 (11th Cir. 1984)
Green v. Zant, 715 F.2d 551 (11th Cir. 1983)
Henson v. Wyrick, 634 F.2d 1080 (8th Cir. 1981)
Anderson v. Warden, 696 F.2d 296 (4th Cir. *en banc* 1982)
Lockett v. Blackburn, 571 F.2d 309 (5th Cir. 1978)
Silverstein v. Henderson, 706 F.2d 361 (2d Cir. 1983)
Hawkins V. Lefevre, 758 F.2d 866 (2d Cir. 1985)
Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983)

10. Some critics of S.238 have said that it will have little if any effect on the federal courts' workload; that state prisoners will continue to file essentially the same number of habeas petitions, having only to change the emphasis of their claims from the "correctness" to the "fairness" of state court proceedings. Federal judges will still be required to review the substance of state judgments to determine whether they are fair and reasonable. Rather than diminishing the current workload, it is more likely that a new standard for federal court review would cause extensive future litigation over the proper interpretation of the standard as applied to particular constitutional questions.
How do you respond to this?

11. In your prepared testimony you state that "the exercise by individual trial judges of the authority to review and overturn the considered judgments of state supreme courts is a perennial source of tension." Isn't this tension similar to the tension which exists between the federal courts and Congress, and Congress and the Executive Branch, and a valuable check within our judicial system?

12. Isn't a statute of limitations without a tolling provision to protect against manifest injustice unconstitutional in that it might permit custody of a person who had committed no crime?

13. How do you reconcile Art.I, Sec.9, Cl.2 of the U.S. Constitution ("The privilege of the Writ of Habeas Corpus whall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.") with a statute of limitations which would bar the federal courts from reviewing the constitutionality of state custody after the period had expired?

14. How does the provision in S.238, that full and fair determinations of factual issues by a state court are presumed correct unless rebutted by clear and convincing evidence, change the existing rule?
How could the provision be rewritten to distinguish between purely factual issues and mixed questions of law and fact?

15. Different kinds of federal claims are exhausted in different state proceedings. Exhaustion does not occur simultaneously for all claims so different habeas petitions would have to be filed at different times to comply with a statute of limitations. Can you suggest a way to avoid the necessity of filing successive petitions?

16. S.238 provides that constitutional rights may be lost by default if a claim is not raised at the proper time or in the proper manner in state court. Does this mean that mistakes by counsel, whose overall performance does not amount to 6th Amendment ineffective assistance, which result in the denial of fundamental constitutional rights, can not be corrected by a federal habeas court?

17. What evidence is there that petitioners deliberately delay filing their habeas claims, in order to avoid retrial? Doesn't Rule 9(a) of the 28 U.S.C. Sec. 2254 Rules protect states against prejudice in just such a case?

SENATOR PATRICK LEAHY
SUPPLEMENTARY QUESTIONS FOR STEVEN TROTT
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE
SENATE JUDICIARY COMMITTEE
HEARING ON S.238
OCTOBER 8, 1985

1. Between 1976 and 1982, nearly 70% of federal habeas appeals involving capital cases resulted in reversals of convictions or sentences. Between February 1983 and October 1985, in the Fifth, Eighth and Eleventh Circuits, of a total of 97 habeas petitions filed in capital cases, 39 resulted in reversals of convictions and/or sentences. Many of these prisoners had their death sentences commuted to life in prison. How do you reconcile these statistics with your statement that there is "no evidence that federal habeas corpus has actually served in recent years to correct injustices occurring in state proceedings?" Were these habeas cases wrongly decided by the federal courts?

2. In Bozeman v. Lambert, No.83-H-579-N (M.D. Ala. 4/13/84), aff'd, No.84-7286 (5/6/85) (per curiam), a black woman was convicted of voter fraud in state court. By the time the lawyers who filed her petition for habeas corpus in federal court learned about her case, the state trial and appeal were over. The federal court granted her petition, finding that there was no evidence to support the charge.

If she had been in prison following her state appeal and the one year statute of limitations had run, during which time she was unaware of her right of habeas corpus and unrepresented by counsel, what relief could she have obtained under S.238?

3. The Legal Defense Fund has made this statement regarding the one year statute of limitations in S.238:

> "the one-year rule seems utterly oblivious to the realities of most prisoners' postconviction situations. The vast majority of prisoners are indigents who are no longer entitled to the assistance of counsel after direct appeal. They are often poor, friendless and confused about their legal status. LDF has assisted many clients who were in fact psychotic, catatonic or clinically imbecilic, unable even to comprehend the days of the week. Many cannot read. Often they have no access even to their own trial transcripts and other necessary records. Access afforded by prison authorities to prison libraries with basic legal texts is often grudging at best. Prisoners' comprehension of such legal technicalities as 'exhaustion of remedies' is frequently poor."

Can you suggest a way to modify the statute of limitations provision in S.238 to address the issue of finality without cutting off the rights of unrepresented, uneducated prisoners?

Questions of Senator Biden to Department of Justice

A. Authority of Federal Judges To Review Constitutional Claims Arising In State Criminal Proceedings

1. On page 5 of your statement you contend that Congress passed the Habeas Corpus Act of 1867 to provide a federal remedy for former slaves who were being held in involuntary servitude in violation of wartime emancipation decrees. Yet, you also acknowledge that the Act of 1867 extended the writ of habeas corpus to persons "restrained of liberty" in violation of federal law.

Question: Doesn't Congresses' use of language empowering federal courts to remedy unconstitutional deprivations of liberty generally rather than deprivations of liberty which violated the Emancipation Decrees or the 13th Amendment provide critical support for federal Judicial review of state criminal proceeding?

Question: Isn't it also significant that no Congress since the passage of the Act of 1867 has limited federal habeas jurisdiction to cases involving former slaves being held in violation of Emancipation Decrees?

2. On page 6 of your statement you assert that:

> By the 1960's habeas corpus was established in its contemporary character as a mechanism by which state criminal judgements...can effectively be appealed to the federal trial courts.

Question: Isn't it true that decisions or the Supreme Court, during the 1920s and 1930s, such as Moore v. Dempsey, 261 US 86 (1923), establish conclusively that the Act of 1867 empowered federal judges to review federal constitutional claims which arise in state criminal proceedings?

B. Continuing Need For Federal Habeas Review Of Constitutional Claims

1. On page 7 of your statement you assert that:

> There is no evidence that there is currently any general insensitivity to claims of federal rights in the state courts...

Question: Do you mean to imply by that statement that state courts once were insensitive to claims to federal rights? If so, when did those state courts "generally" begin to evince a proper sensitivity to federal rights?

2. On page 7 of your statement you also contend that:

> There is no evidence that federal habeas corpus has actually served in recent years to correct injustices occuring in state proceedings?

Question: Do you agree that Supreme Court and federal appellate court decisions in habeas corpus cases during the past thirty years have articulated fundamental constitutional principles?

Question: Identify the ten most recent Supreme Court and Federal Appellate court cases which erroneously granted habeas corpus petitions.

Question: How should the relevant federal court have ruled on the constitutional claims raised in the following cases:

Irving v. Dowd, 366 US 717 (1961)
Miller v. Pate, 386 US 1 (1967)
Brewer v. Williams, 430 US 387 (1977)

Freeman V. Georgia, 599 F 2d 65 (5th Cir 1979)
Hensen v. Wyrick, 634 F 2d 1080 (8th Cir 1981)
Davis v. Zant, 721 F 2d 1478 (11th Cir 1983)
affd on rehearing, Davis v. Kemp, 752 F 2d 1543 (11th Cir. 1985)
Alston v. Garrison, 720 F 2d 812 (4th Cir 1983)
Hawkins v. LeFeure, 758 F 2d 866 (2nd Cir 1985)
Bozeman v. Lambert, 11th Cir, No 84-7286 (May 6, 1985) (per curiam)

3. On page 7 of your statement you assert that:

> there is no evidence that direct review in the Supreme Court does not provide an adequate means of maintaining uniformity and supremacy of law in state criminal cases...

Question: Do you agree that precluding federal district and appellate courts review of constitutional claims will simply redirect hundreds, if not thousands, of prisoners to seek direct review of their constitutional claims in the Supreme Court through petitions for certiorari? If so, would such a dramatic increase in petitions for certiorari undermine the ability of the Supreme Court Justices to consider carefully petitions for certiorari in all cases.

C. Discretionary Power To Limit Federal Habeas Jurisdiction To Accommodate Principles Of Comity And Finality

S. 238 extends current law to require federal courts to defer to a state court's determination of all constitutional claims.

Question: Shouldn't federal courts have a greater role reviewing constitutional claims that either protect the accuracy of the fact-finding process or ensure the defendent's guilt or innocence than they do in enforcing the exclusionary rule as a rememdy for unconstitutional searches-and-seizures?

Question: Do you agree that the distinction between constitutional rights that ensure that defendants receive a fair trial and the exclusion of evidence seized in violation of the 4th amendment partially explains why the Supreme Court, despite numerous opportunities, has not applied the Rule set forth in Stone v. Powell to constitutional claims generally?

Question: How does the definition of "cause" on page 2, lines 6-15 of S. 238 differ from evolving judicial definitions of "cause" as that term was used in Wainwright v. Sykes .

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 20, 1985

Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for your letter of October 16 transmitting a number of questions from yourself and Senator Biden relating to habeas corpus reform. We have also received a second letter dated October 23 from Tim Rieser of your staff which contains some additional questions. In most instances the questions presented have already been answered in the course of the Committee's study of habeas corpus reform. In brief, our responses are as follows:

I. Questions of Senator Leahy

1. The first question asks what S. 238 would do to reduce the number of habeas corpus petitions.

The bill would limit delayed, repetitive and frivolous petitions, and facilitate the disposition of all petitions, by establishing a time limit for habeas corpus applications, narrowing the standard of review for claims previously adjudicated in the state courts, clarifying the standards for permitting claims to be raised that were not raised properly in state court, permitting an unexhausted petition to be denied on the merits on its initial presentation to a federal court, and limiting the authority to authorize appeals in habeas corpus cases to appellate judges.

The question also recites some unrelated empirical data concerning the incidence of hearings in habeas corpus cases. The possible suggestion that habeas corpus cases require little work because most do not involve evidentiary hearings is fallacious for the reasons noted in our statement in *Comprehensive Crime Control Act of 1983*: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st. Sess. 41 (1983)[hereafter cited as "Crime Control Act Hearings."]

2-6. Questions 2 through 6 ask for empirical data relating to the work involved in dealing with habeas corpus petitions, the incidence of successful petitions and further proceedings following the grant of a petition, and representation of petitioners by counsel.

Extensive empirical data on the work involved in dealing with habeas corpus petitions and the incidence of hearings appears in P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 21-23 (Dept. of Justice 1979). See also our dicussion of this issue in Crime Control Act Hearings, supra, at 41, and in The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 42-44 (1982)[hereafter cited as "1982 Habeas Corpus Hearing"]. According to the empirical study cited above, 3.2% of petitions result in some type of relief and 1.8% result in an order of release from custody. Petitioners are represented or assisted by counsel in about one-fifth of all cases. In cases in which evidentiary hearings are held, appointment of counsel for indigents is required by Rule 8(c) of the habeas corpus procedural rules.

7. The seventh question, citing a Bureau of Justice Statistics Special Report on Habeas Corpus, notes that tne number of habeas corpus petitions filed in 1982 was lower than the 1970 figure of 9,063, and asks for an explanation of this discrepancy.

The number of habeas corpus petitions decreased between 1970 and 1977, but has increased fairly steadily for the past several years. Possible reasons for the decline in the early 1970's are noted in the Report cited in your question at pages 2-3.

8. The eighth question asks for the basis of our assertion that habeas corpus litigation generally reflects harassment or recreational activity by prisoners. This assesment is based on the high incidence of frivolous petitions, the low probability of success, the frequency of repetitive applications, and the general familiarity of participants in the criminal justice system with the character and motivation of prisoner litigation.

9. Question 9 lists ten cases and asks whether the state court determinations in these cases would be subject to review "on the merits" if S. 238 had been in effect. Under the bill, claims of the sort presented in these cases would be subject to review under the "full and fair" standard of proposed 28 U.S.C. §2254(d), including review of the state adjudication of the claim for reasonableness and consistency with due process. See S. Rep. No. 226, 98th Cong., 1st Sess. 25-26 (1983). There is nothing in the cited decisions 1/ which shows or implies that

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1/ The case of Farmer v. Harris has not been reported and no opinion in that case is available to us at this time.

the relevant claims could not have been presented for review under this standard in conformity with the rules proposed in S. 238.

10. The tenth question asks us to assess an objection that the change in the standard of review proposed in the bill will not reduce the work involved in disposing of habeas corpus petitions. This objection has already been answered by the Committee itself in its report on S. 1763 of the 98th Congress, see S. Rep. No. 226, 98th Cong., 1st Sess. 6-7, 27-28 (1983), and in our response to the same objection in Crime Control Act Hearings, supra, at 32-33.

11. The eleventh question asks whether the tension created between state and federal courts by habeas corpus review is similar to tensions existing among the branches of the federal government, and whether it is a "valuable check within our judicial system."

Federal habeas corpus review of state judgments bears no similarity to the constitutional system of checks and balances among the branches of the federal government, since review of state judgments by this means has no basis in the Constitution. See our testimony at page 2-6. The only form of review of state judgments contemplated by the Constitution is direct review in the Supreme Court, which provides the constitutionally grounded "check" on the state judiciaries. See Article III of the Constitution.

12. The twelfth question asks: "Isn't a statute of limitations without a tolling provision to protect against manifest injustice unconstitutional in that it might permit custody of a person who had committed no crime?"

This question reflects an apparent misunderstanding of the nature of federal habeas corpus review. A defendant who discovers conclusive evidence of his innocence following his conviction cannot secure his release by applying for federal habeas corpus under the existing system of review, since a mistaken conviction, in the absence of violations of constitutional rights, is not a ground for relief. Guilt or innocence, as such, are simply not in issue in federal habeas corpus proceedings. When miscarriages of justice of this sort come to light in the state systems, they are presently dealt with through state collateral remedies or state executive clemency.

On the general issue raised by the question, it is clear that there is no constitutional problem with limiting the time within which a state prisoner may apply for federal habeas corpus, since Congress is not required to make federal habeas corpus available to state prisoners at all. See our testimony at pages 2-6. We would note further that the judicial remedy for a federal prisoner who discovers new evidence of his innocence following his conviction is subject under Fed. R. Crim. P. 33 to a two year time limit which does not incorporate "a tolling provision to protect against manifest injustice." A federal prisoner who discovers evidence of his innocence beyond that period is limited to seeking executive clemency. We would assume that Rule 33, promulgated by the Supreme Court, is not constitutionally infirm on the ground that "it might permit custody of a person who had committed no crime."

Finally, an open-ended exception to the proposed time limitation rule for cases of "manifest injustice" would largely negate the value of this reform. This point is fully discussed in Crime Control Act Hearings, supra, at 40-41.

13. The thirteenth question asks whether the time limitation rule proposed in the bill is consistent with the Suspension Clause of the Constitution.

It is clear beyond all question that the Suspension Clause was not meant to afford state prisoners any collateral remedy in the federal courts, much less a remedy that is available without limitation of time. The "writ of habeas corpus" by which inferior federal courts currently review state judgments is simply not the writ referred to in the Constitution. This point is discussed exhaustively in our testimony at pages 2-6.

14. The fourteenth inquiry contains two questions: "How does the provision in S. 238, that full and fair determinations of factual issues by a state court are presumed correct unless rebutted by clear and convincing evidence, change the existing rule? How could the provision be rewritten to distinguish between purely factual issues and mixed questions of law and fact?"

Proposed 28 U.S.C. §2254(e) in S. 238 is a simplification and tightening of the rules governing the redetermination of factual issues in habeas corpus proceedings. The interpretation of proposed §2254(e) is set out in the Committee Report on S. 1763, S. Rep. No. 226, 98th Cong., 1st Sess. 28 (1983). Discussion showing the relationship of the "full and fair" standard of proposed §2254(d) and (e) in the bill to the criteria for redetermination of factual issues under Townsend v. Sain and the similar criteria of current 28 U.S.C. §2254(d) appears in 1982 Habeas Corpus Hearing, supra, at 93-98, 100-01.

The second part of the question may reflect a misunderstanding of the scope of proposed §2254(e) under the bill and its relationship to the broader rule of deference under proposed §2254(d), which applies to both factual and non-factual determinations. These points are explained in the Committee's Report on S. 1763, S. Rep. No. 226, 98th Cong., 1st Sess. 28-29 (1983).

15. The fifteenth question asks: "Different kinds of federal claims are exhausted in different state proceedings.

Exhaustion does not occur simultaneously for all claims so different habeas petitions would have to be filed at different times to comply with a statute of limitations. Can you suggest a way to avoid the necessity of filing successive petitions?"

The concern raised in the question is not significant. All claims exhausted on direct review could, of course, be presented in a single petition, and a limitation period would ensure that no undue delay would occur between the conclusion of direct review and the filing of such a petition. Litigation at the state level requiring recourse to state collateral remedies is likely to relate to the effectiveness of assistance of counsel at trial and on direct review. This would at most warrant a second petition at a later time.

Since state prisoners now quite frequently file repetitive habeas corpus applications -- presenting exhausted claims, unexhausted claims, or a mixture of the two -- at various stages of review of their cases in the state courts, the fact that a time limitation rule might occasionally result in a second petition is not a substantial concern. Overall, the reforms proposed in S. 238 should substantially reduce the incidence of repetitive applications by permitting unexhausted claims to be denied on the merits on their initial presentation to a federal court, and by establishing reasonable time limits on the presentation of all claims.

16. The sixteenth question notes that S. 238, like current law, provides that potential constitutional claims can be forfeited through procedural defaults at the state level. It asks whether this means that mistakes by counsel, "whose overall performance does not amount to 6th Amendment ineffective assistance, which result in the denial of fundamental constitutional rights, can not be corrected by a federal habeas court?"

The question appears to presuppose a distinction between "fundamental" and "non-fundamental" constitutional rights whose meaning is unclear. If the point of the question is simply to inquire whether constitutionally ineffective assistance of counsel is to be the general standard for excusing procedural defaults based on counsel error, then it is clear from the Committee's discussion of this issue that that is precisely what is intended. See S. Rep. No. 226, 98th Cong., 1st Sess. 13-14 (1983). It is also reasonably clear that the Supreme Court would not hold under current law that counsel error falling short of constitutional ineffectiveness excuses procedural defaults with respect to potential constitutional claims. See Brief for the United States Amicus Curiae, Sielaff v. Carrier, No. 84-1554 (Sup. Ct. 1985).

17. The seventeenth inquiry involves two questions: "What evidence is there that petitioners deliberately delay filing their habeas claims, in order to avoid retrial? Doesn't

Rule 9(a) of the [Habeas Corpus] Rules protect states against prejudice in just such a case?"

The first question is answered in Crime Control Act Hearings, supra, at 39. With respect to the second question, it is worth considering the various appellate decisions which have held or stated that prejudice to the possibility of retrial can never be grounds for dismissing a petition under Rule 9(a). See Aiken v. Spalding, 684 F.2d 632 (9th Cir. 1982), cert. denied, 460 U.S. 1093 (1983); Alexander v. Maryland, 719 F.2d 1241, 1247 n.10 (4th Cir. 1983); Strahan v. Blackburn, 750 F.2d 438, 441 (5th Cir. 1985). See generally Crime Control Act Hearings, supra, at 37-38.

Additional Questions. In the letter of October 23 from your staff, the first question sets out figures on the incidence of successful habeas corpus applications in capital cases, and asks us to comment on their significance.

The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), threw the law of capital punishment into a state of chaos. Indeed, the confusion resulting from this decision was so great that carrying out executions was nearly impossible for about a decade thereafter. In later decisions the Court began to re-introduce some order, but did so by creating a variety of new substantive and procedural rules for capital cases. The implementation of these novel requirements has primarily been carried out by state courts and state legislatures, but the availability of federal habeas corpus has made it possible to continue the litigation of capital cases in the lower federal courts.

Given the general confusion created by judicial innovations in this area, and the regular emergence of new requirements, it is not suprising that it has been possible to find capital cases that could be successfully litigated in federal habeas corpus proceedings. The law in this area has recently become more settled -- a fact evidenced by the resumption of executions on a significant basis -- and it is reasonable to expect that habeas corpus litigation in capital cases will assume a more regular character in the future. Since state court determinations in capital cases, as well as in non-capital cases, would remain subject to review for reasonableness under the "full and fair" standard of S. 238, it is difficult to see what implications the data recited in the question could be thought to have for the advisability of enacting this legislation.

Questions 2 and 3 in the supplementary letter amount to an inquiry whether the time limitation rules proposed in S. 238 are overly restrictive as a limitation on the re-opening of criminal cases in federal court by state prisoners following the exhaustion of state remedies.

The limitation rules proposed in S. 238 are highly generous in comparison with limitations on the re-opening of criminal cases by prisoners that are currently recognized in federal law, including the normal ten day limit on appeals in federal prosecutions, the normal ninety day limit on state prisoners' applications for direct review in the Supreme Court, and the unqualified two-year limit on motions for new trials based on newly discovered evidence under Fed. R. Crim. P. 33. The issues raised in these questions are fully discussed in Crime Control Act Hearings, supra, at 37-41.

II. Questions of Senator Biden

Part A, Subpart 1. This section contains two questions relating to the Habeas Corpus Act of 1867 and later Congressional action.

The first question asks whether the reference to persons "restrained of liberty" in violation of federal law in the Act of 1867 provides "critical support for federal judicial review of state criminal proceedings."

The Habeas Corpus Act of 1867 was drafted in response to a resolution of the House of Representatives directing its Judiciary Committee

> to inquire and report to the House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.

The "resolution of March 3, 1865," referred to in this directive was a measure pre-dating the Thirteenth Amendment which freed the families of Black Union soldiers who lived in areas that were not covered by the earlier Emancipation Proclamation. The reference to the constitutional amendment abolishing slavery is self-explanatory.

The initial version of the bill resulting from this directive extended the availability of habeas corpus in the federal courts to persons held in "slavery or involuntary servitude," but a later version of the bill, which was eventually enacted, contained the broader "restraint of liberty" language. The probable reason for this language change may be found in the efforts of the former Confederate states to circumvent the Thirteenth Amendment by enacting oppressive apprenticeship, contract labor, and vagrancy laws that restrained the liberty of former slaves. The broader language of the final version of the bill would be more readily applicable to restraints of liberty under these laws than the narrower "slavery or involuntary servitude" language. Since there were virtually no limitations on restraints of liberty in the states under federal constitutional or statutory law in 1867, aside from the Thirteenth Amendment and related civil rights legislation, no broader purpose can be inferred from the language of the final version of the bill.

There is an abundance of other direct and indirect evidence showing that the purpose of the Act of 1867 was to enforce the Thirteenth Amendment, and that there was no thought of having federal habeas corpus serve as a means of reviewing criminal convictions. Indeed, given the traditional character and function of habeas corpus, see our testimony at pages 2-6, such a use of the writ would have been inconceivable in the nineteenth century. The relevant history is thoroughly reviewed in Lewis Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965).

The second question in Part A asks whether it is significant that "no Congress since the passage of the Act of 1867 has limited federal habeas jurisdiction to cases involving former slaves being held in violation of Emancipation Decrees?"

This fact has no significance, since Congress has played virtually no role in creating the existing federal habeas corpus juridiction. Rather, its existence is the result of judicial misconstructions of the Act of 1867. Where later Congressional enactments in this area have departed significantly from prior judicial decisions, the departures have invariably been in the direction of restricting the availability of federal habeas corpus. See 28 U.S.C. §2253 (certificate of probable cause required for appeal in habeas corpus cases); 28 U.S.C. §2254(d) (presumption of correctness for state court factual determinations satisfying specified criteria); Rule 9(a) of the Rules Governing §2254 Cases (laches doctrine applies to habeas corpus applications).

Part A, Subpart 2. This section contains a single question asking whether Supreme Court decisions in the 1920's and 1930's, such as Moore v. Dempsey, 261 U.S. 86 (1923), established conclusively that the Act of 1867 empowered federal judges to review federal constitutional claims which arise in state criminal proceedings .

The answer to this question is clearly no. The decision in Moore v. Dempsey involved no examination of the text or legislative history of the Habeas Corpus Act of 1867, and has no relevance in determining what the Act was meant to do. Moreover, Moore v. Dempsey held only that federal habeas review is available, in the absence of adequate state corrective process, to examine constitutional violations in sham trials conducted under mob domination. The Court made it clear that federal habeas corpus was not to be available as a means of entertaining ordinary claims of legal error:

> It certainly is true that mere mistakes of law are not to be corrected [by habeas corpus]. But if ... the whole proceeding is a mask -- that counsel, jury, and judge were swept to the fatal end by an irrestible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.... We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. (261 U.S. at 91-92).

Following Moore v. Dempsey, the rule continued to be that federal courts in habeas corpus proceedings would not ordinarily reexamine constitutional claims that had already been decided by the state courts. See Ex Parte Hawk, 321 U.S. 114, 118 (1944). The definitive break with close to a century of judicial construction of the Act of 1867 came in the decisions of Brown v. Allen in 1953 and Townsend v. Sain in 1963. These decisions stipulated that federal habeas corpus was thereafter to be available as a routine means of redetermining federal questions that have already been decided by the state courts.

Part B, Subpart 1. This section contains one question which asks whether state courts have been insensitive to federal rights in the past, and if so, when they have improved. This issue has been addressed by Attorney General William French Smith in an essay he published on habeas corpus reform in 1983 (Proposals for Habeas Corpus in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 149):

> A final observation is in order concerning the very different conditions that prevailed at the time of the Supreme Court's creation of the current federal habeas corpus jurisdiction. When Brown v. Allen was decided in 1953, the criminal justice systems of many states were subverted by the effects of state-enforced racial segregation. That year also stood near the beginning of the modern decisions of the Supreme Court expanding the rights of state criminal defendants. The innovations effected by the Court in that period were sometimes initially greeted with limited comprehension or with at best grudging acceptance.
>
> It is apparent that these conditions no longer exist. Institutionalized racism has fallen as the result of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the decisions of the Supreme Court invalidating state-sanctioned racial segregation. The basic

> federal rights of criminal defendants have by now been settled for many years. They are applied routinely by state judges as a familiar part of the procedure in criminal cases.
>
> The unique historical circumstances obtaining at the time of the decision of *Brown v. Allen* may have led the Supreme Court to see a need for a broad supervisory authority of the lower federal courts over state criminal proceedings. One may question the validity of perpetuating this authority into a time when the circumstances that gave rise to it no longer exist.

Part B, Subpart 2. This section contains three questions. The first question asks whether the Supreme Court and federal appellate court decisions in habeas corpus cases during the past thirty years have articulated fundamental constitutional principles.

Most of the Supreme Court's important constitutional decisions on questions of criminal procedure in the last thirty years have occurred in cases brought up on direct review from the highest court of a state. While some important issues have fortuitously been addressed in the context of habeas corpus litigation, the same issues could have been brought up and decided in direct review cases. Most rulings by federal appellate courts on constitutional questions occur in the context of appeals from convictions in federal prosecutions. The views of federal appellate courts on constitutional questions do not, of course, have any binding effect on state courts. *See generally* S. Rep. No. 226, 98th Cong., 1st Sess. 26 n.103 (1983).

The second question in this section asks for examples of recent Supreme Court and court of appeals decisions which erroneously granted habeas corpus petitions. Some examples at the court of appeals level are *Yount v. Patton*, 710 F.2d 956 (3d Cir. 1983) (overturning conviction of murderer), *rev'd*, 52 USLW 4896 (1984); *Phelps v. Duckworth*, 757 F.2d 811 (7th Cir. 1985) (overturning conviction of rapist), *rev'd on rehearing en banc*, No. 84-1052; *Witt v. Wainwright*, 714 F.2d 1069 (11th Cir. 1983) (overturning capital sentence of murderer of eleven-year-old boy), *modified*, 723 F.2d 769 (1984), *rev'd*, 53 USLW 4108 (1985); *Lonberger v. Jago*, 651 F.2d 447 (6th Cir. 1981) (overturning aggravated murder conviction), *rev'd sub nom. Marshall v. Lonberger*, 459 U.S. 422 (1983); *Spain v. Rushen*, 701 F. 2d 186 (9th Cir. 1983) (overturning murder conviction), *vacated and remanded*, 464 U.S. 114 (1983); *Bell v. Perini*, 635 F.2d 575 (6th Cir. 1980) (overturning murder conviction), *rev'd and remanded sub nom. Engle v. Isaac*, 456 U.S. 107 (1982); *Hughes v. Engle*, 642 F.2d 451 (6th Cir. 1980) (overturning manslaughter conviction), *rev'd and remanded sub nom. Engle v. Isaac*, 456 U.S. 107 (1982); *Barnes v. Jones*, 665 F.2d 427 (2d. Cir. 1981) (overturning conviction for robbery and assault), *rev'd*, 463 U.S.

745 (1983); Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (overturning district court's denial of writ to triple murderer), rev'd, 52 USLW 4565 (1984); Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1 (1982) (overturning theft tools conviction), rev'd, 52 USLW 4460 (1984); Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981) (overturning manslaughter conviction), rev'd and remanded, 455 U.S. 603 (1982) (per curiam); Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979) (overturning murder conviction), vacated and remanded, 449 U.S. 539 (1981); Mata v. Sumner, 649 F.2d 713 (9th Cir. 1981) (overturning murder conviction again), vacated and remanded, 455 U.S. 591 (1982); Van Curen v. Jago, 641 F.2d 411 (6th Cir. 1981) (overturning pre-release rescission of parole decision), rev'd, 454 U.S. 14 (1981) (per curiam); Rivera v. Harris, 643 F.2d 86 (2d Cir. 1981) (overturning robbery conviction), rev'd, 454 U.S. 339 (1981) (per curiam).

With respect to the Supreme Court, we believe that the Court has embarked on a sound course in its recent habeas corpus decisions, restoring considerations of federalism and finality in habeas corpus litigation that were simply ignored in the decisions of the 1960's. The potential for action by the Court is limited, however, by the constraints imposed by precedent and existing statutes and rules, the need to proceed on a case-by-case basis, and the absence of consensus among the Justices as to what specific reforms are desirable. Basic improvements cannot be expected in the absence of legislative reforms like those proposed in S. 238.

The third question in this section asks us to comment on six court of appeals decisions and three Supreme Court decisions, presumably with an eye toward determining the desirability of the reforms proposed in S. 238. The court of appeals decisions require no lengthy discussion, since there is nothing in the cited decisions which shows or implies that these cases could not have been presented for review under the standards proposed in S. 238. See generally the answer to question number 9 of Senator Leahy.

The Supreme Court cases cited in the question are well-known decisions that merit more detailed discussion. As they bear on the supposed necessity of continuing federal habeas corpus review in its current character, we think that their facts speak for themselves.

Brewer v. Williams, 430 U.S. 387 (1977). The case arose from Robert Williams' rape and murder of a ten-year-old girl in 1968. Williams' conviction for the offense was upheld by the Iowa Supreme Court. He then sought habeas corpus in federal district court, which granted the writ on the ground that statements by Williams to the police disclosing the location of his victim's body and evidence derived therefrom should have been excluded. The granting of the writ was upheld by a divided panel of the Eighth Circuit. The Supreme Court granted review and affirmed the judgment of the court of appeals. Justices White, Blackmun, and Rehnquist and Chief Justice Burger dissented.

Williams was re-tried and convicted again in 1977. Following a second trip up to the Supreme Court and the passage of sixteen years from the commission of the crime, the conviction was upheld in Nix v. Williams, 52 USLW 4732 (1984).

Irvin v. Dowd, 366 U.S. 717 (1961). The case related to Leslie Irvin's conviction for a murder he committed in 1954. Irvin had confessed to the commission of five other murders, in addition to the particular crime for which he was convicted.

Irvin's murder conviction was upheld in the Indiana courts, and his initial petition for certiorari to the Supreme Court was denied. He then applied for habeas corpus in federal district court, which dismissed his petition on the ground that he had not exhausted state remedies. The Seventh Circuit upheld the dismissal of the petition, but was reversed by the Supreme Court, which read the state record as showing a decision of Irvin's claims on the merits.

On remand, the Seventh circuit denied the writ on the merits. See 271 F.2d 552 (7th Cir. 1959). The appellate court, in particular, rejected a claim of jury bias based on prejudicial pre-trial publicity. The court noted, among other factors, the widespread publicity that inevitably accompanies notorious crimes under modern conditions of communication and transportation, and the painstaking inquiry undertaken by the trial judge to ensure an impartial jury.

The Supreme Court granted review and vacated the judgment of the Seventh circuit. The Court agreed with the lower courts concerning the general standards to be applied in determining jury bias based on pre-trial publicity, but believed that the potential for bias was sufficiently great under the facts of the case that the conviction should be overturned.

Following the grant of the writ, Irvin was retried and convicted again. He spent the rest of his life in Indiana State Prison.

Miller v. Pate, 386 U.S. 1 (1967). The case arose from the rape and murder of an an eight-year-old girl in 1955. Lloyd Miller confessed to the crime and was convicted. Miller's conviction was upheld by the Illinois Supreme Court on appeal, see 148 N.E.2d 455 (1958), and a subsequent habeas corpus petition in federal court was denied. Following further state proceedings, Miller again applied for federal habeas corpus, this time successfully. The district court's decision granting the writ was reversed by the Seventh Circuit Court of Appeals. See 342 F.2d 646 (1965).

The Supreme Court granted review and reversed. The Court believed, based on the presence of paint on a pair of shorts that had been admitted in evidence at trial, that the prosecutor had deliberately lied in characterizing the item as stained with blood. The state had introduced expert testimony at trial that there was blood on the shorts, but a test performed by a defense expert at the time of the habeas corpus hearing in 1963 showed no sign of hemoglobin.

The factual predicate of the claim of prosecutorial misconduct on which relief was ultimately granted in this case was initially discovered by the defense shortly before the habeas corpus hearing in 1963. *See* Maguire, Weinstein, Chadbourn, & Mansfield, *Cases and Materials on Evidence* 111 (1973). The state courts were never presented with this claim and had no opportunity to rule on it. However, such claims can be presented in collateral proceedings in Illinois. *See People v. Sawyer*, 268 N.E.2d 689 (Ill. 1971); *People v. Sims*, 282 N.E.2d 16 (Ill. App. 1972). Moreover, S. 238 authorizes review of newly discovered claims even where a procedural default has occurred at the state level under proposed 28 U.S.C. §2244(d)(3), and incorporates a similar qualification to its time limitation rule in proposed 28 U.S.C. §2244(e)(4).

Following the grant of the writ, the Illinois State Bar Association carried out an exhaustive investigation of the case over a nine month period to determine whether disciplinary action should be taken against the responsible prosecutors. The Bar Association issued a report on May 14, 1968, which concluded that the Supreme Court's conclusions in the case were groundless, and that there had been no misrepresentation or other misconduct by the prosecutors. In part, the report read as follows (*reproduced in* 2 Inbau, Thompson, & Sowle, *Cases and Comments on Criminal Justice* 1184-87 (3d ed. 1968)):

> In 1956, Lloyd Eldon Miller, Jr. was tried and convicted in the Circuit Court of Hancock County, Illinois of the murder of an 8-year-old Canton, Illinois girl, Janice May. On February 13, 1967, the United States Supreme Court overturned the murder conviction on the ground that the prosecution had knowingly used false evidence to convict him by introducing into evidence a pair of undershorts which it contended were stained with blood. The Court based its decision on testimony given seven years later at a habeas corpus hearing in the U.S. District Court in Chicago, to the effect that the only stains on the shorts were paint stains. In its opinion the Supreme Court said that the prosecution at the original trial had "deliberately misrepresented the truth" in regard to the shorts.
>
> The prosecution was conducted by Blaine Ramsey, then State's Attorney of Fulton County, and Roger W. Hayes, as special assistant.

In view of the serious implications of such charges, the Grievance Committee of the Illinois State Bar Association, on its own motion, commenced an investigation in April of 1967 to determine whether disciplinary action against the prosecutors was warranted. . . .

It became apparent to the Committee early in its investigation that the United States Supreme Court had misapprehended the facts of the case. At the trial, which took place in 1956, the State chemist testified that there *were* bloodstains on the shorts in question. Prior to the trial, the prosecutors had been given a laboratory report from the Illinois State Bureau of Criminal Identification and Investigation which disclosed that the shorts did, in fact, contain blood. The State chemist further testified at the trial that the blood on the shorts was type 'A' which was the same type as that of the victim.

The Committee found no reason to doubt that there was blood on the shorts at the time of the trial and no reason to doubt that the prosecutors in the case believed there was blood on the shorts. Accordingly, the Committee found that there was no basis for the view of the United States Supreme Court that the prosecution had been guilty of a misrepresentation when it asserted as a fact that the shorts contained blood.

The Committee investigation further disclosed that, in addition to the blood, there was paint on the shorts. It is clear that the prosecution knew, or at least assumed, there was paint on the shorts as well as blood, and the prosecutors contend that the difference was apparent.

The question before the Grievance Committee, then, was not whether the prosecution misrepresented the fact that there was *blood* on the shorts, because clearly its statement to this effect was not a misrepresentation. *Instead the question was, assuming the defense did not know of the paint, whether the prosecution was guilty of unethical conduct in failing to disclose its presence to the defense.* The resolution of this question depended, in the judgment of the Grievance Committee, upon whether there was any reason to believe that the prosecution felt the facts concerning the paint would have been helpful to the defense and, knowing of its relevance, nonetheless concealed it. The Grievance Committee determined that the presence or absence of paint on the shorts was not a material question in the case. There *was* blood on the shorts. The theory of the prosecution was that Miller had discarded the shorts because of the incriminating bloodstains they bore. The presence of paint on the shorts was not inconsistent with this theory because the shorts were found in an area in which there were paint cans. The paint on the shorts might have had some tendency to corroborate Miller's confession that he had left them in that area.

The Committee concluded that the decision of the U.S. Supreme Court was based entirely upon a portion of the testimony which had been given at the habeas corpus hearing in the United States District Court at Chicago. The Supreme Court rejected the testimony given at the original trial eleven years earlier, and ignored the testimony of the State chemist who again testified at the habeas corpus proceedings that there was blood on the shorts.

At the time of the habeas corpus hearing, the defense offered an expert witness who testified that he had examined twelve threads from the shorts and had found that they contained paint, a carbon-like substance and an additional substance he was unable to identify. This chemist, engaged by the defense, admitted that he had made no conclusive tests for the presence of blood and that, indeed, he was not 'permitted' to make such tests. He further added that in order to determine if blood were on the shorts, 'it would require a more extensive test and would require having access to every part of the garment.' The record shows, however, that the defense was given permission to send portions of the shorts to a chemist in New York City, one Dr. Leon Susman. Presumably, Dr. Susman made a test for blood, but the results of that test have never been disclosed. At the time of the original trial the prosecution was duty bound to present to the jury the results of the examination of the shorts by the Illinois State Bureau of Criminal Identification and Investigation. . . .

Although, in cases where no disciplinary action is recommended, the rules of the Illinois Supreme Court prohibit disclosure by the Illinois State Bar Association of the contents of its records and files in grievance investigations without the consent of the respondents, it was determined that the considerable notoriety concerning this matter warranted an exception. We therefore sought and obtained the necessary consent of the prosecuting attorneys to release the foregoing information. The opinion of the United States Supreme Court left the impression that a grave injustice had been deliberately perpetrated by a ruthless and unprincipled prosecution. A thorough and objective investigation of the matter has shown that this impression is unfounded. The Illinois State Bar

Association believes that the public is entitled to know the actual state of the record.

Part B, Subpart 3. This section contains a single question which asks whether restricting habeas corpus would result in an excessive burden on the Supreme Court's direct review jurisdiction.

The Justices of the Supreme Court evidently do not share this concern, since a majority of them have spoken out strongly in favor of fundamental limitations on federal habeas corpus. See the statements cited in S. Rep. No. 226, 98th Cong., 1st Sess. 5 n.13 (1983). Recourse to the Supreme Court on direct review is limited by a normal ninety day time limit under the Supreme Court Rules, a safeguard against a burdensome volume of applications that is simply lacking in the case of habeas corpus. Moreover, the Supreme Court is regularly required each term to grant certiorari in a number of cases to resolve unsettled questions of habeas corpus procedure and to reverse unsound decisions by appellate courts granting writs of habeas corpus. The greater definiteness of standards and the narrowing of the grounds for granting relief that would result from the enactment of S. 238 should accordingly result in an overall decrease in the Supreme Court's workload.

Part C. The first question in this part asks whether the standard of review for claims bearing on potential guilt or innocence should be broader than that for Fourth Amendment exclusionary rule claims under Stone v. Powell.

This question mistakenly assumes that the general standard of review under S. 238 is the same as that of Stone v. Powell. In fact, it is broader, including a review of the reasonableness of the state determination. See S. Rep. No. 226, 98th Cong., 1st Sess. 25-26 & n.102 (1983).

The second question asks us to speculate on the reasons why the Supreme Court has not extended the rule of Stone v. Powell to other types of claims. This question evidently reflects the same misapprehension as the preceding one. The Supreme Court's own statement of its rationale for not extending Stone v. Powell may be found in the one case in which it has considered a possible extension. See Rose v. Mitchell, 443 U.S. 545 (1979).

The final question asks how the proposed definition of "cause" excusing a procedural default under S. 238 compares to the corresponding notion under existing caselaw. This question is analyzed at length in S. Rep. No. 226, 98th Cong., 1st Sess. 13-16 (1983). Additional discussion bearing on this issue appears in Brief for the United States Amicus Curiae, Sielaff v. Carrier, No. 84-1554 (Sup. Ct. 1985).

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

Senator **Leahy**. The next panel is Phylis Bamberger, representing the ABA; Prof. Larry Yackle, representing the ACLU, and John Charles Boger, representing the NAACP Legal Defense and Educational Fund.

Ms. Bamberger is the attorney in charge of the appeals section, Federal defender of the Legal Aid Society of New York.

Professor Yackle is professor of law at the Boston University Law School.

I welcome you all here. I would say again what I mentioned to Mr. Trott. We do have an unfortunate bind which is not of your making. I would ask, again, each one of you to address yourselves initially to two points: What this bill might do to cut down on frivolous habeas petitions, and second, whether this bill, in your estimation, will preclude Federal courts from hearing or deciding Federal questions.

I will leave it up to the three of you as to how you would like to proceed.

STATEMENT OF A PANEL, INCLUDING: PHYLIS SKLOOT BAMBERGER, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; LARRY W. YACKLE, PROFESSOR OF LAW, BOSTON UNIVERSITY SCHOOL OF LAW, ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION; AND JOHN CHARLES BOGER, ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

Ms. **Bamberger**. I will go first, Senator, by agreement of the group here.

Senator **Leahy**. Go ahead.

Ms. **Bamberger**. The question of frivolous claims is a very significant one. Presumably, the definition of "frivolous" as I have heard it used means any writ that is denied, or a case in which a hearing is denied.

That is an inaccurate definition. There are many petitions which are denied in which the claims have merit, and some of them might even be successful. However, they are prepared by pro se petitioners who do not have the skills necessary to analyze the legal issues, present the factual basis for their claims, and articulate clearly to the Federal courts the reasons why they have exhausted State remedies using the proper State procedures for doing so.

In these cases, it is hardly fair to call the claims "frivolous," because they may be meritorious. They appear to lack merit only because the petitioner is incapable on his own of preparing that proper petition.

Most habeas corpus cases that come to the Federal courts ere pro se. That means that an often illiterate, non-English-speaking person prepares the writ without any idea of the nuances which are required to properly present that claim to the court.

Senator **Leahy**. Excuse me. There are also a lot of them that are by the same jailhouse lawyers who put together the same form over and over again for just about everybody who comes in, sometimes just for a few packs of cigarettes.

Ms. **Bamberger**. Exactly. And that does not properly present the claim of the individual petitioner based on his particular case.

Now, that is not to say that there are not frivolous habeas corpus cases before Federal courts. It is the position of lawyers involved with habeas cases that the best way to handle the frivolous cases is to get them out of the Federal courts as quickly as possible, before presentation to a judge if that is at all possible.

The Supreme Court of the United States has provided us with a tool for doing that, and it appears in a case called *Anders* v. *California.* That decision says a case on appeal which presents no nonfrivolous issue, may be briefed by the lawyer for the court before which the case is pending with a full explanation of why the case presents no issue.

The same thing can be done in habeas corpus cases. That is, a lawyer can present to the court a fully—briefed memorandum, explaining why there is no Federal constitutional issue, or no Federal constitutional issue which has been properly presented to the State courts in accordance with State procedures.

But there is even a better way of handling those cases, one we have used as practitioners in the Federal courts handling many habeas corpus cases in the district courts and in the Second Circuit Court of Appeals. That is, we encourage our clients to withdraw their frivolous claims and petitions, with a full explanation to them as to why this case is not properly before the court. Now, that is not an inconsistency, the position that I took that most petitioners are pro se and that we are assigned as counsel. In fact, under the Criminal Justice Act, there can be assignments of counsel made in habeas corpus cases. The right of the judge to make the assignment is discretionary with the judge, depending upon how the judge perceives the issue or the difficulty of the case.

In most cases, lawyers are not assigned. But I can tell you that from our experience, in the cases in which we are assigned, we make a deliberate effort as counsel and as officers of the court to have frivolous claims and petitions withdrawn; and where that is not possible, we advise the court of appeals on an appeal that there is no nonfrivolous issue in the case.

The statute of limitations proposed in the bill does not reduce frivolous claims because it really ends the availability of habeas corpus as a remedy for all claims. It makes no distinction between claims. And that is the crux of the matter. The effort in this bill is to treat habeas corpus cases differently from other kinds of judicial actions, but they are really like other cases. Judges need to look at the claim and the papers and decide whether or not the issue has merit and should be reviewed, or whether the issue has no merit and should be dismissed.

The full and fair adjudication provision, as well as the statute of limitations provision, really treats habeas corpus cases as a lump; they make no distinction based on merit or frivolity.

It is interesting to note that the Justice Department here this morning has indicated that poor decisions or unconstitutional decisions by State courts can be remedied on appeal in the Federal system. There is no such thing. The only availability——

Senator **Leahy**. I have kind of wondered about that myself, as you may have gathered from my questions.

Ms. **Bamberger**. Yes. Without habeas corpus the only access to a Federal court for a State defendant who is convicted of a crime is on a petition for writ of certiorari to the United States Supreme Court, or if a State statute has been challenged as unconstitutional but held constitutional by the State court, there is what is known as appellate jurisdiction, which is also discretionary, because the court can——

Senator **Leahy**. I understand. That is why I was concerned about that. I know that in the State system, you normally have an automatic right of appeal to the State appellate court. But Mr. Trott's reference to a right of Federal appeal is certainly not one that has been within my experience.

Do you agree with what he stated earlier in answer to the concern I expressed about a Federal court under this bill being precluded from reviewing Federal questions? Do you agree with his statement that of course it would be, if the State court had misconstrued the Constitution?

Ms. **Bamberger**. You are talking about the "reasonableness" interpretation.

Senator **Leahy**. Maybe I should rephrase that. I told Mr. Trott that I felt that this bill as written precludes a Federal court from determining a Federal constitutional issue if the proceeding had been fair in the State court. And the hypothesis I raised with him was that of a State judge who had been reading the statements, for example, of the Attorney General, and actually thought the Attorney General's interpretation that the Constitution should not be applied to the States was correct. You may have the fairest and most impartial judge in the State court handle the thing very well, hear all the issues, but just apply the Constitution wrong.

In that circumstance, could the Federal court under this bill review those Federal issues?

Ms. **Bamberger**. No, not by way of habeas corpus, in any event. And the only other way to do it would be by petition for writ of certiorari to the Supreme Court from the State court of highest jurisdiction. And the number of writs granted each year by the Supreme Court we know is very small compared to the number of criminal cases that come up in our State courts.

The literal language of the statute would preclude Federal review of that issue by way of habeas corpus.

Now, the Justice Department seeks to amend the literal language of the bill with the report, which we refer to extensively in our statement, which was submitted.

Senator **Leahy**. Yes, I have read that.

Ms. **Bamberger**. It is very unclear to me how the Congress can think that that report will amend the language of the statute, because the report really is a totally different formulation of the principles than is the bill. And that is not what legislation, at least as I understand it, means——

Senator **Leahy**. Believe me, Ms. Bamberger, this Member of Congress does not believe that the report amends the law. I take the position on a criminal law matter that it should be interpreted very strictly, and I read only what is within the four corners of the bill. I take the same attitude you do, that the report does not amend or modify the law.

I would ask the other two members of the panel, if I could interrupt at this point, whether both of you share that same view on that issue?

Professor **Yackle**. The ACLU certainly does. This is sloppy work, Senator. The statute ought to be drafted in a way that speaks its intent.

Mr. **Boger**. Certainly, the NAACP Legal Defense Fund agrees. There is a kind of "now you see it, now you don't" quality to the Senate report.

Your question, Senator, to the Department of Justice is our question. If that is in fact what the proposed legislation means, if it does permit Federal redetermination, surely, the language can be drafted to say so. But the language as written, the language as one would read it, does not appear to permit Federal redetermination.

Senator **Leahy**. You understand my concern. I am not concerned so much about the absolute kangaroo type trial in the State courts. Those are egregious instances which tend to work their way through another court system, at least today, with the attention the press and everybody else may give to a case. What I am concerned about is somebody, who with the purest and highest of motives, misapplies the Constitution, whether it is on a search and seizure question, a fifth amendment question, or anything else. That is what concerns me about this bill.

Mr. **Boger**. There is an illustrative point, Mr. Chairman, in the experience under the *Stone* versus *Powell* case, which prohibits the Federal relitigation of fourth amendment questions on which there has been a full and fair opportunity for a hearing in State courts.

In one instance in my recollection, the United States Court of Appeals for the Fifth Circuit identified an Alabama case in which, in good faith, the State supreme court had simply misread a binding precedent of the Supreme Court on a search and seizure matter. The fifth circuit felt constrained, under *Stone* versus *Powell*, to say the State adjudication was wrong, it was a mistake, but that the Federal courts were bound by the decision of the Alabama Supreme Court in that case, and the Federal courts could not correct that wrong, could not do justice to that individual habeas petitioner.

Ms. **Bamberger**. Senator, I would like to put for the record an example of a situation in which counsel can help to sort out frivolous and nonfrivolous claims. A case came into our office involving an evidentiary issue; clearly, it was a State law issue, and clearly, the district judge properly denied relief under the habeas corpus statute.

In examining the record in the case to which we had been assigned on the appeal, we discovered a question of inadequate proof of guilt, which is a Federal constitutional claim under *Jackson* against *Virginia*. That issue had been fully briefed in the State trial courts and in the State appellate courts. The petition had been filed pro se and the issue was not included in the petition before the Federal district court. When we got the case on appeal, we requested of the second circuit the opportunity to take that case back down to the district court before we briefed the issue, which had been properly preserved in the State courts, but which the petitioner did not understand and did not raise in his petition.

I cannot at this moment say we are going to be successful in that case, because it is still before the courts. But the point of the story is that here you had a petitioner who raised a totally frivolous claim in a case where there was a very meritorious Federal claim, and it was the aid of counsel that was able to distinguish between the two, get the frivolous claim out of the court and present the right one to the court.

Senator **Leahy**. Thank you.

I am now going to turn this hearing over to Judge Heflin. Senator Heflin is from Alabama. He has actually sat on some of these cases. I am going to turn it over to you, Howell.

Senator **Heflin**. Where are the pachyderms?

Senator **Leahy**. The pachyderms are meeting just off the "Cave of the Winds", as I explained to somebody earlier, waiting for us donkeys to get over there and start kicking up a fuss, I suppose.

At some point, I will also reserve the right to correct and modify the record.

Thank you very much. I appreciate the time and effort you all have put into this. As I stated before, I personally would like to see some changes in the Federal habeas law, but I cannot accept one that goes this far. I would hope to work with Senators who are in favor of it to try and come up with something acceptable. Otherwise, I suspect it is going to be a long time before it goes from here to the House and that it won't get through a committee of conference until adjournment time next year, if ever.

Thank you.

Senator **Heflin** [presiding]. I have a statement, which I will ask be made part of the record, without objection.

[Statement follows:]

STATEMENT OF SENATOR HOWELL HEFLIN
S. 238 -- HABEAS CORPUS LEGISLATION
OCTOBER 8, 1985

MR. CHAIRMAN:

I COMMEND YOU AND THE OTHER SENATORS, PARTICULARLY THE DISTINGUISHED CHAIRMAN OF THE JUDICIARY COMMITTEE, SENATOR THURMOND, WHO HAVE BEEN AT THE FOREFRONT OF EFFORTS TO MAKE NECESSARY CHANGES IN THE "GREAT WRIT" -- THE WRIT OF HABEAS CORPUS.

OUR FOUNDING FATHERS ESTABLISHED THE WRIT OF HABEAS CORPUS TO GUARANTEE AMERICAN CITIZENS PROTECTION FROM THE KIND OF ILLEGAL DETAINERS THEY HAD BEEN SUBJECT TO UNDER THE ENGLISH KINGS. IN 1788, AS TODAY, AN ARRESTED PERSON IS ENTITLED TO BE BROUGHT BEFORE A COURT OF LAW TO HAVE THE LEGALITY OF HIS CONFINEMENT REVIEWED. THE "GREAT WRIT" WILL ALWAYS STAND AS OUR GUARANTEE, AS AMERICANS, OF FREEDOM FROM THE MYSTERIOUS IMPRISONMENTS OCCURRING EVERY DAY IN COUNTRIES LACKING THE CONSTITUTIONAL GUARANTEES WE ENJOY.

UNFORTUNATELY, IN THE PAST HALF CENTURY, THE HABEAS WRIT HAS BEEN INCREASINGLY USED AS AN APPEAL DEVICE RATHER THAN THE CONSTITUTIONALLY MANDATED SAFEGUARD IT WAS INTENDED TO BE.

REVISIONS IN THE HABEAS WRIT COULD HAVE PREVENTED THE FOLLOWING SITUATION, WHICH OCCURRED IN MY OWN STATE OF

ALABAMA: AFTER A SEVEN STATE RAMPAGE OF VIOLENT CRIME, ROBBERY, AND MURDER, A DEFENDANT PLED GUILTY, AND WAS CONVICTED BY A JURY OF MURDER. A SENTENCE OF DEATH WAS ENTERED, AFTER A JUDGE DETERMINED, AS REQUIRED BY STATE LAW, THAT AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATING CIRCUMSTANCES. THE ALABAMA COURT OF CRIMINAL APPEALS AND THE ALABAMA SUPREME COURT UPHELD THE CONVICTION. THE UNITED STATES SUPREME COURT DENIED CERTIORARI. TWO YEARS LATER, ON A HABEAS WRIT, THE STATE COURT JUDGMENT WAS REVERSED BY THE FIFTH CIRCUIT. FIVE YEARS AFTER INDICTMENT, THE UNITED STATES SUPREME COURT OVERTURNED THE FIFTH CIRCUIT DECISION. ALTHOUGH A SECOND WRIT OF HABEAS CORPUS, AND THEN A THIRD WRIT WERE FILED, THE SENTENCE WAS CARRIED OUT SIX YEARS AFTER THE GUILTY PLEA WAS ENTERED. OF COURSE, REVIEW OF A CAPITAL CONVICTION REQUIRES CAREFUL SCRUTINY, BUT STATE JUDGES, NO LESS THAN FEDERAL JUDGES, MUST UPHOLD THEIR CONSTITUTIONAL OBLIGATIONS.

WHEN A DEFENDANT IS TRIED IN A STATE COURT FOR A VIOLATION OF A STATE LAW, IT IS THE DUTY OF A STATE JUDGE TO CONSCIENTIOUSLY DECIDE ANY FEDERAL QUESTION WHICH MAY ARISE, IN ACCORDANCE WITH THE CONSTITUTION. ONE IMPORTANT CHECK ON WHETHER THE STATE COURT IS PROPERLY ADMINISTERING FEDERAL LAW IS REVIEW BY THE UNITED STATES SUPREME COURT. THIS IS AVAILABLE UPON APPEAL FROM DECISIONS BY THE HIGHEST STATE TRIBUNAL.

GIVEN THIS SYSTEM OF REVIEW, SOME HAVE QUESTIONED

WHETHER OUR FEDERAL SYSTEM REQUIRES AN ADDITIONAL COLLATERAL REVIEW OF STATE COURT DECISIONS BY LOWER FEDERAL COURTS, AND WHAT PURPOSE THIS REVIEW WILL SERVE.

APART FROM THE PROPER REGARD FOR THE STATURE OF STATE COURTS, THE NEED FOR FINALITY IN CRIMINAL ADJUDICATIONS AND THE CONSERVATION OF JUDICIAL RESOURCES ARE COMPELLING REASONS FOR REFORM OF HABEAS PROCEDURES.

THERE IS NO DOUBT THAT THE PROBLEMS OF FINALITY AND INTEGRITY IN STATE COURT JUDGMENTS ALSO HAVE AN ACUTE EFFECT ON THE ENFORCEMENT OF OUR CRIMINAL LAW. OUR CRIMINAL JUSTICE SYSTEM CANNOT BE EFFECTIVE UNLESS ONE WHO VIOLATES THE LAW KNOWS THAT HE WILL BE SWIFTLY AND CERTAINLY PUNISHED. CRIMINALS WHO DO NOT FEAR IMMEDIATE PUNISHMENT ARE MUCH MORE LIKELY TO BREAK THE LAW AGAIN. I BELIEVE THE LACK OF CERTAINTY OF PUNISHMENT IS ONE OF THE REASONS OUR CRIME RATE CONTINUES TO RISE AND PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM IS AT AN ALL TIME LOW.

CERTAINLY OUR CRIMINAL JUSTICE SYSTEM MUST NEVER LOSE SIGHT OF THE NOTIONS OF DUE PROCESS AND EQUAL PROTECTION. ULTIMATELY IT MUST STRIKE A BALANCE BETWEEN THE NEED FOR PRESENTING CLAIMS IN AN ORDERLY AND TIMELY MANNER AND THE NEED TO PROTECT THE INNOCENT FROM FALSE PROSECUTIONS

THE DISCUSSION SURROUNDING OUR HABEAS CORPUS LAWS IS NOT NEW, AND CONGRESS IS NOT ALONE IN ITS RECOGNITION OF THE

PROBLEM. THE NEED FOR AN ESCAPE VALVE IN THE EXCEPTIONAL CASE HAS NOT GONE UNNOTICED BY CERTAIN MEMBERS OF THE SUPREME COURT. CHIEF JUSTICE WARREN BURGER HAS ASKED THAT FEDERAL COLLATERAL REVIEW OF STATE COURT CONVICTIONS BE LIMITED TO CLAIMS OF MANIFEST MISCARRIAGES OF JUSTICE. SUCH AN APPROACH SUGGESTS THE DESIRABILITY OF LEAVING SOME DISCRETION IN THE FEDERAL COURTS, IN CASES WHERE A STATE COURT SYSTEM DOES NOT FULFILL ITS CONSTITUTIONALLY MANDATED DUTIES.

WHEN THE SENATE JUDICIARY COMMITTEE HELD HEARINGS ON HABEAS CORPUS REVIEW IN THE 97TH CONGRESS, I HAD THE OPPORTUNITY TO CHAIR ONE OF THOSE HEARINGS. TWO WITNESSES FROM MY HOME STATE OF ALABAMA PRESENTED TESTIMONY: THE HONORABLE C.C. TORBERT, JR., CHIEF JUSTICE OF THE ALABAMA SUPREME COURT, AND CHARLES A. GRADDICK, ALABAMA'S STATE ATTORNEY GENERAL.

THEIR TESTIMONY, BY AND LARGE, RECOGNIZED THE PRESENT ABILITY AND THE COMPETENCY OF MOST OF OUR STATE COURTS TO PROVIDE DEFENDANTS WITH A FULL AND FAIR ADJUDICATION WHICH WOULD MEET CONSTITUTIONAL STANDARDS. GIVEN THESE CIRCUMSTANCES, WE MIGHT, WITH SOME CONFIDENCE, CONSIDER MEASURES TO ELIMINATE THE ABUSE OF THE "GREAT WRIT". I URGE MY COLLEAGUES TO CAREFULLY CONSIDER THE LEGISLATION BEFORE THE COMMITTEE TODAY.

THANK YOU, MR. CHAIRMAN.

Senator HEFLIN [presiding]. I am sorry I missed the early part of the testimony. I have participated in hearings on this issue for a number of years, and sometimes it is necessary to refresh ones memory on the contents of specific proposals.

Basically, I suppose there are several issues—the full and fair determination in the State court, a statute of limitations, as a general rule. Are you opposed to any statute of limitations whatsoever?

STATEMENT OF LARRY W. YACKLE

Professor YACKLE. Yes, Senator, we are. I am here this morning to speak for the American Civil Liberties Union, and certainly the ACLU does oppose the 1 year statute of limitations on a number of grounds.

As Ms. Bamberger has said, it is going to cut off every claim, meritorious or not, in an effort, apparently, just to cut off frivolous claims. It is not groomed to identify which issues are frivolous and which are not.

As drafted now, it allows habeas applicants only 1 year. That is not very long, even for a good attorney, to marshal arguments and to prepare them for a court of law, Federal or State.

It runs from the date of the exhaustion of State remedies. That, Senator, is a legal question—a most difficult question even for the Federal courts to answer, that is, to identify the date when State remedies have been exhausted.

You are familiar with the literature on the exhaustion doctrine. It is going to be very difficult for the Federal courts to implement such a statute if it runs from that sort of date rather than a date-certain. But, of course, it cannot run from a date-certain like the date of judgment; that would suggest that the prisoner is to exhaust State remedies, marshal arguments, and then get to the Federal courthouse door within 1 year.

The statute of limitations is just a bad idea. It was rejected years ago, when Congress took up the question of tardy claims. That is why Congress, with the aid of the Supreme Court, established rule 9(a), which speaks straightforwardly to the question of delayed habeas corpus petitions. Rule 9 offers a much more flexible, reasonable, and fair way to deal with tardy petitioners.

One other thing, Senator. The data we have suggest that prisoners do not sit on their rights. They have no incentive to sit on their rights, for a year or a day. They do their level best to pursue Federal relief just as quickly as they can. One year just is not long enough. We oppose a fixed statute of limitations.

STATEMENT OF JOHN CHARLES BOGER

Mr. BOGER. Senator, habeas corpus is an equitable writ. The very notion of the statute of limitations, as Professor Yackle says, works against that interest in equity.

Certainly, a statute of limitations of a 1-year period presents all kinds of difficulties which apparently are not even fully contemplated in the legislative history behind this bill.

For example, if a prisoner takes three claims, to his State supreme court, all of them constitutional questions and the State supreme court passes on all three of those claims they are, under current law, exhausted, and therefore available for Federal review.

The 1-year statute of limitations under this bill would presumably begin to run.

If the prisoner then sought certiorari to the Supreme Court of the United States, and certiorari were granted, well over a year could pass while the prisoner was before the U.S. Supreme Court, and his rights on Federal habeas review would be lost while his case was pending in the Supreme Court.

As another example, Senator, if the State supreme court, presented with these three claims, agreed that one of them required a further hearing in the State trial court, and remanded the matter after rejecting the other two claims, the prisoner would be in the anomalous position of going back to the State trial court on one issue on which he might prevail, requiring a new trial, and yet obligated to go simultaneously into the Federal courts on the two issues that had been rejected by the State supreme court and were therefore exhausted.

Even an astute lawyer, would not readily be able to cope with the kinds of problems that I have outlined, and I have just begin to scratch the surface on the difficulties that this kind of statute of limitations provision, 1 year or 2 years or 3 years, might present.

I know I have litigated many cases in which—through pursuit of legitimate State processes that the State itself wants to see pursued—2 and 3 years have gone by, while other claims that have been exhausted are "parked" if would, while the former claims are being pursued actively through the State courts.

To cut off those claims I am sure, is not the intention of the sponsors of this legislation, but it is the inevitable result of a statute of limitations of that kind.

Ms. Bamberger. The purpose of the statute of limitations is presumably to cut delays in the completion of criminal cases. However, the statute of limitations, the 1-year period, or the period for filing of the writ by a petitioner, is not the real cause for delay. The real cause, rather, stems from both sides of the process in which the filing of the petition is the middle. State courts have long had difficulty in timely and speedily processing State appeals. The primary difficulty in processing State appeals seems to be obtaining transcripts of the trial which are necessary to process that appeal. It seems to be an insurmountable problem.

The National Center for State Courts did a study on it several years ago, and their projections or their statistics with respect to delay are cited in our report.

It seems to me that if we wish to cut delays, the answer is not to put an unreasonable time limit on a petitioner—and I will get to that in a minute—but find out why it sometimes takes 3, 4, or 5 years to process the direct criminal appeal in the State courts.

I would suggest that perhaps Congress or this group can propose some mechanism or study for trying to understand the reason for the delays in processing these cases which, from all indications, come, as I said, from transcript delay.

Now we get to the other side. Assuming that a petitioner files his petition for writ of habeas corpus, there is often a rather long time period before the decision comes from the Federal court on that habeas corpus petition. It would be interesting to also ascertain why there are delays in the decisions by Federal courts.

Now, if you look at the one year which is allotted in this statute, one year is not sufficient time for a generally incarcerated petitioner to prepare the writ. First of all, law libraries in prisons are notoriously poor. There is no access to counsel, there is little access to legal advisors. Even if a library is available, access to it is severely restricted by prison rules. Often prisoners are transferred from one prison to another, and the Supreme Court says that that can be done without any reason at all on the part of prison officials. That transfer could result in a delayed filing which is no fault of the prisoner.

Very often there are searches of prisoners' cells in which property, including legal documents and cases and papers is confiscated. The Supreme Court has said that such searches are constitutional. Yet they may result in the inability of a petitioner to present his case on time to the courts.

In the context of the plaintiff petitioner that you are dealing with in these cases, the 1-year statute of limitations is not only, we believe, unconstitutional, but it is impossible to comply with that time in most cases. And of course, as Mr. Boger pointed out, the statute of limitations will create the need for successive and repetitive petitions, because the moment of exhaustion very often differs for each of the claims properly raised by a petitioner. And so, the petitioner will have to file the petition relating to each claim as that claim is exhausted, rather than presenting all of the claims at the same time.

It is interesting, because rule 9(b) is supposed to deal with successive petitions, and it does, but it also provides the flexibility that a statute of limitations does not provide for, by allowing judges to consider these difficulties on the part of prisoners.

Of course, there is no tolling provision in the statute of limitations proposed by this bill, and to my mind, that is unheard of. I know of no statute of limitations, even for the Government to present its case to and get an indictment from the grand jury, which does not include a tolling provision.

Professor YACKLE. Judge Heflin, we have touched upon the relationship between the exhaustion doctrine and any proposed statute of limitations. In this connection—and I know you will be surprised to hear me say this—there is something proposed by the Department of Justice that is a good idea. It is to overrule *Rose* versus *Lundy,* a case decided in 1982. I do not suggest that if Congress were to overrule *Rose* versus *Lundy,* the ACLU would subscribe to a statute of limitations. But *Rose* is a bad case. It is a misinterpretation of existing law.

We are not pleased with the way this bill tries to overrule *Rose* versus *Lundy,* but the committee report in 1983 did contemplate that *Rose* would be overruled.

I just state that for the record. I am not sure it is necesary to go into *Rose* and the peculiar state of affairs that that case has produced. But the ACLU does think it would be a good idea and in aid of efficient habeas corpus procedure if the Senate were to overrule *Rose* legislatively.

Senator HEFLIN. Do any of you have any suggestions in addition to what Professor Yackle has stated, concerning any aspect of collateral review that you might advocate to cure some of the problems that exist in this field?

Ms. **Bamberger**. Yes, sir. I would suggest an amendment to not the habeas corpus statute, but to the Criminal Justice Act, which would indicate the Congress intent that counsel be assigned in more of these cases, so that there can be an intelligent, informed way of getting frivolous cases out of the courts and meritorious cases properly presented to the courts.

Professor **Yackle**. There is one other matter that Senator Leahy raised. He is concerned about the distinction between fact and law. That distinction is drawn in existing habeas corpus statutes. We have had a great deal of difficulty, though, in distinguishing between facts and law, so that the Federal courts can know what sorts of State court determinations are due a presumption of correctness in Federal court under present law.

I think that the Senate might well take some time to clarify the distinction between fact and law. That would help in habeas corpus matters, generally. Certainly, I and the ACLU would be glad to work with the Senators' staff to come up with language that would be preferable even to existing law. This is not to say that the proposal regarding questions of fact in this bill, S. 238, does that sort of thing; it does not. It is a poor provision, in my judgment.

We would be prepared to propose various other "housekeeping" measures in habeas corpus. The Senate might well clean up a number of relatively noncontroversial matters, and we would be glad to submit a memorandum on that.

Senator **Heflin**. If you would like to submit something in writing concerning those aspects we would be delighted to receive that.

Professor **Yackle**. Yes, sir, we will.

Senator **Heflin**. Without objection, the statement of Chief Justice W. Ward Reynoldson, president of the Conference of Chief Justices, will be made a part of the record.

[Statement follows:]

Conference of Chief Justices

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STATEMENT OF

CHIEF JUSTICE W. WARD REYNOLDSON
SUPREME COURT OF IOWA
PRESIDENT, CONFERENCE OF CHIEF JUSTICES

THE BROOKINGS INSTITUTION
SEMINAR ON THE ADMINISTRATION OF JUSTICE

COLONIAL WILLIAMSBURG
MARCH 10, 1985

It is a high honor to be accorded this opportunity to address briefly some of the state-federal concerns of the Conference of Chief Justices. Recalling an expression I heard as a Nebraska kid many years ago, I note Mr. Cikins "threw a tight loop" in limiting the topics I might address. Perhaps he was warned that my current discourses often include lengthy pleas for federal legislation[1] to nullify the United States Supreme Court decision in *Pulliam v. Allen*[2] (holding state judges liable for attorney fees in section 1983[3] cases), and for an appropriation to activate the State Justice Institute, so wisely created by the last Congress.

Or perhaps Mr. Cikins, in suggesting federal habeas corpus review of state judgments as one of the topics, simply wanted to give me a final right of alloc~~a~~ution, in view of my unrewarded efforts before this seminar in 1982,[4] and subsequent testimony before the Committee on the Judiciary of the Senate.[5]

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[1] This legislation has now been introduced as H.R. 877, by the Honorable George W. Gekas, Congressman from Pennsylvania.

[2] 104 S. Ct. 1970 (1984).

[3] 42 U.S.C. § 1983.

[4] See Statement of Chief Justice W. Ward Reynoldson before the Brookings Institution Fifth Seminar on the Administration of Justice, January 31, 1982, reprinted in part, 6 State Court Journal 24 (1982).

[5] S. Rep. No. 98-226, 98th Cong., 1st Sess. 2, 6, 7, 9; Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Senate Committee on the Judiciary, 97th Congress, 2d Sess. 226-240.

Over the years, the Conference of Chief Justices has supported legislation to restore some logic to our present system of habeas corpus review of state court convictions. Commencing in 1957,[6] we have sought legislation designed to contribute to the orderly and timely presentation of claims on behalf of state prisoners, to enhance the finality of state criminal processes, and to assure appropriate respect for state court factual and legal determinations.[7]

Nothing has contributed more to the destruction of the public's confidence in the courts, both federal and state, than the lack of finality in criminal convictions. There is an inherent redundancy in collateral federal habeas corpus attacks on state judgments.[8] No one has advanced a satisfactory reason why state supreme court decisions, carefully researched and reasoned to provide defendants the full panoply of federal constitutional rights, should be reviewed and set aside by the ruling of a single federal district judge.

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[6] S. 1011, introduced February 1, 1957, and companion bill H.R. 8361, were endorsed in that year's New York meeting of the Chief Justices.

[7] Resolutions endorsing such amendments to United States habeas statutes were adopted at the Annual Meeting of August 5, 1981, the midyear meeting of January 30, 1983, and the annual meeting of July 27, 1983. Similar unsuccessful activities of federal judges to secure habeas corpus reform are described by Winkle, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s* 68 Judicature 263 (1985).

[8] The scope of these collateral attacks is summarized in L. Yackle, *Postconviction Remedies*, 366-70 (1981).

For a moment, examine with me the history of the infamous Iowa murder case involving Robert Anthony Williams. Following the "Christian burial" remarks of a detective, Williams led the police to where he had thrown the body of his victim, a ten-year-old girl. Williams was first convicted on May 14, 1969, following a jury trial.[9] Now, almost sixteen years later, it appears his life sentence has been finalized by a 1985 Eighth Circuit decision after remand by the Supreme Court. In those long years the case went twice to the Supreme Court on habeas corpus, and was retried once in the state court. At least eight reviews involving forty-eight judges consumed the attention of prosecutors and defense counsel, and depleted the resources of Iowa.[10]

Nor has the burden fallen only on state prosecutors and judges. In 1984, state prisoners filed 26,581 petitions in federal district court.[11] Of these, 8,349 were petitions for writ of habeas corpus. That this was a decrease of 2.1 percent from 1983 filings provides little comfort. The

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[9] See State v. Williams, 182 N.W.2d 396, 398 (Iowa 1970).

[10] See, in sequential order, State v. Williams, 182 N.W.2d 396 (Iowa 1970); Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974); Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974); Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); State v. Williams, 285 N.W.2d 248 (Iowa 1979); Williams v. Nix, 528 F. Supp. 664 (S.D. Iowa 1981); Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983); Nix v. Williams, _____ U.S. _____, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); Williams v. Nix, _____ F.2d _____ (8th Cir. 1985).

[11] 1984 Director of the Administrative Office of the United States Courts Ann. Rep., table 24.

SECTION 1983 CIVIL RIGHTS PETITIONS--NOW THE PREFERRED VEHICLE FOR CERTAIN CLAIMS FORMERLY BROUGHT BY HABEAS CORPUS[12]--INCREASED 2.0 PERCENT, TO 18,034.[13]

THE STATUTORY AMENDMENTS SUPPORTED BY THE CONFERENCE OF CHIEF JUSTICES WERE PASSED BY THE SENATE AS S. 1763 IN 1984. THE BILL PUT A LIMITATION ON HABEAS REVIEWS IN THE ABSENCE OF ENUMERATED EXTENUATING CIRCUMSTANCES, CODIFIED THE "CAUSE AND PREJUDICE" PRINCIPLE OF *WAINWRIGHT V. SYKES*,[14] AND BARRED CONSIDERATION OF CLAIMS FULLY AND FAIRLY ADJUDICATED IN STATE PROCEEDINGS.

WE THINK SUCH LEGISLATION WOULD SOUND THE DEATH KNELL FOR THE ANTIQUATED PERCEPTION THAT MODERN STATE JUDGES, WHO TAKE AN OATH TO UPHOLD THE UNITED STATES CONSTITUTION, ARE nonetheless incapable of applying its provisions. The Supreme Court has declared that when the process of direct review comes to an end, a presumption of finality and legality attaches to a state conviction and sentence, and that federal courts are not forums in which to relitigate state trials.[15] Moreover, the Court's opinions more than once have expressed its confidence in the ability of state courts to uphold federal law.[16] The problem will continue to waste both state and federal judicial time and effort, however, until a bill like S. 1763 becomes the law.

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[12] IN AN EFFORT TO AVOID THE EXHAUSTION REQUIREMENTS OF HABEAS CORPUS, STATE PRISONERS SEEKING RELIEF IN FEDERAL COURT OFTEN CHARACTERIZE PETITIONS ATTACKING THE VALIDITY OF THEIR CONVICTIONS AS SECTION 1983 ACTIONS. THIS RUSE HAS BEEN POPULAR WITH PRISONERS FOR MANY YEARS. SEE, E.G., BENNETT V. ALLEN, 396 F.2D 788, 790 (9TH CIR. 1968); GAITO V. ELLENBOGEN, 425 F.2D 845, 848 (3D CIR. 1970). IN AN EFFORT TO CONTAIN THIS PRACTICE, FEDERAL COURTS HAVE FASHIONED THE CIRCUMVENTION RULE. SEE EDWARDS V. SCHMIDT, 321 F. SUPP. 68, 70 (W.D. WIS. 1971); COMMENT, 5 RUTGERS-CAMDEN L. J. 307, 311-12 (1974). THE RULE HAS NOT BEEN WHOLLY EFFECTIVE BECAUSE PRISONERS, WITH MUCH TIME ON THEIR HANDS AND LITTLE TO OCCUPY THEIR MINDS, HAVE FOUND NEW WAYS TO SKIRT THE RULE. SOME OF THESE EFFORTS HAVE BEEN SUCCESSFUL; OTHERS HAVE NOT. COMPARE KALEC V. ADAMOWSKI, 406 F.2D 536, 537 (7TH CIR. 1969) WITH HAMLIN V. WARREN, 664 F.2D 29, 32 (4TH CIR. 1981) AND HODGIN V. ROTH, 536 F. SUPP. 454, 459 (E.D. PA. 1982).

[13] 1984 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP., TABLE 24. CIVIL RIGHTS FILINGS SOARED FROM 6,128 IN 1975 TO 18,034 IN 1984.

[14] 433 U.S. 72, 97 S. CT. 2497, 53 L. ED. 2D 594 (1977).

Turning our focus to another issue in the legislative arena, I can report that state judges are alarmed by the Product Liability Act, which Senator Kasten of Wisconsin has reintroduced as S. 100 in the present Congress. This legislation would effectively repeal the product liability statutory and case law of the fifty states and substitute "uniform" federal standards and rules.[17] Because the bill does not create new "federal question" jurisdiction, state courts would continue to try the bulk of the product liability disputes.[18] Initial access to the federal trial courts would be limited to diversity cases. In imposing, for the

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[15] Barefoot v. Estelle, 460 U.S. ____, ____, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090, 1100 (1983).

[16] See, e.g., Sumner v. Mata, 449 U.S. 539, 549, 101 S. Ct. 764, 770, 66 L. Ed. 2d 722, 732 (1981); Allen v. McCurry, 449 U.S. 90, 105, 101 S. Ct. 411, 420, 66 L. Ed. 2d 308, 320 (1980).

[17] Atkeson and Neidich, A Status Report on Proposals for a Federal Product Liability Act, 38 Business Lawyer 623, 631 (1982-83).

[18] Id.; see S. 100, 99th Cong., 1st Sess. § 3(e).

FIRST TIME, THE OBLIGATION OF STATE COURTS TO ASSUME FRONTLINE JURISDICTION OF FEDERAL LAW, THE BILL WOULD EFFECTIVELY NATIONALIZE THE STATE JUDICIARIES IN ADDITION TO UPSETTING STATE LAW.

OF COURSE, AS THE STATES AND TERRITORIES INTERPRET THE LANGUAGE OF THIS LEGISLATION, THE UNIFORMITY SOUGHT WILL BE LOST. CAN YOU IMAGINE FIFTY-SIX JURISDICTIONS, STARTING AFRESH, REACHING THE SAME INTERPRETATION OF SUCH TERMS AS "PROXIMATE CAUSE,"[19] "OTHERWISE IDENTICAL UNITS,"[20] AND "ECONOMICALLY FEASIBLE FOR USE?"[21] THE BURDEN OF RESOLVING THESE CONFLICTS TO DELIVER THE ACT'S PROMISED UNIFORMITY WILL FALL ON THE SUPREME COURT, FIVE OF WHOSE JUSTICES PUBLICLY HAVE CALLED FOR RELIEF FROM THEIR CASE LOAD. EVEN THE MOST GLEEFUL SUPPORTERS OF THE KASTEN BILL CONCEDE THE SUPREME COURT'S PRESENT WORK LOAD IS A SUBSTANTIAL OBSTACLE TO THE ACHIEVEMENT OF THE BILL'S GOALS.[22] THEIR PRESCRIPTION IS TO CREATE MORE FEDERAL JUDGESHIPS,[23] A REMEDY FOUND NOWHERE IN THE ACT. THE ADDITIONAL BURDENS THROWN ON THE STATE JUDICIAL SYSTEMS, AS THEY STRUGGLE WITH A MASSIVE CASE LOAD GENERATED BY UNDEFINED, NEW STATUTORY LANGUAGE, CONCEPTS AND PROCEDURES, HAVE NOT HAD SO MUCH AS AN HONORABLE MENTION.

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[19] SEE S. 100, 99TH CONG., 1ST SESS. § 4(2).

[20] SEE ID. § 5(A)(2).

[21] SEE ID. § 2(9).

[22] REED AND WATKINS, PRODUCT LIABILITY TORT REFORM: THE CALL FOR FEDERAL ACTION, 63 NEB. L. REV. 389, 469 (1984).

[23] ID.

The terms and definitions of the Product Liability Act might at first glance resemble the familiar common law tort landscape. On closer inspection, however, they constitute a veritable terra incognita for the legal world, from which we would not emerge for many years.[24] State courts will sustain the breakdown of established trial procedures. Other states that recognize contributory negligence standards will be compelled, in multi-party litigation, to apply those standards to nonmanufacturing defendants while at the same time, following the edict of this proposed legislation, applying "comparative responsibility" standards to the codefendants engaged in manufacturing.[25]

For this uncertainty, we are asked to jettison the carefully winnowed common law wisdom of the fifty states. In place of common law principles that can adapt to new problems and reflect changes in society's values, we are asked to accept a rigid statutory formulation of untested worth.

This week I examined the proposed bill draft "Product Liability and Compensation Act" promulgated by Washington's Senator Slade Gorton. With all due respect, it seems more

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[24] Twerski, National Product Liability Legislation: In Search for the Best of the Possible Worlds, 18 Idaho L. Rev. 411, 415 (1981-82).

[25] Id. at 469-70; see S. 100, 99th Cong., 1st Sess. § 9(a).

CONFUSING AND FULLY AS DANGEROUS AS THE KASTEN BILL. IT PURPORTS TO RECOGNIZE THE STATES' PRODUCT LIABILITY LAW, BUT PREEMPTS THAT LAW IN EVERY IMPORTANT ASPECT. IT EMPLOYS NEW ESOTERIC TERMS[26] THAT WILL REQUIRE LITIGATION AND SPAWN DIVERGING DECISIONS AMONG STATE AND FEDERAL COURTS. IN TITLE III IT CASTS THE FEDERAL JUDGES IN THE ROLE OF STATE WORKER COMPENSATION COMMISSIONERS, PRESIDING OVER LITIGATION ON THE MERITS OF EVERY COMPENSATION CLAIM REGARDLESS OF DIVERSITY OR OF THE AMOUNT, INCLUDING THE SPIN-OFF MINI-TRIALS RELATING TO THE GOOD FAITH OF EITHER OR BOTH OF THE PARTIES.

IT IS ANOMALOUS, OF COURSE, THAT THESE ATTACKS ON THE HISTORIC RIGHT OF THE STATES TO DEVELOP THEIR OWN STATUTORY AND CASE LAW IN THE TORT FIELD SHOULD BE ATTEMPTED DURING AN ADMINISTRATION THAT TRUMPETS A RETURN TO THE CONSTITUTIONAL CONCEPTS OF FEDERALISM.[27] AND THERE IS A CLEAR DANGER, I SUGGEST, THAT IF THIS VAST INTRUSION INTO A FIELD OF LAW THAT ALWAYS HAS BEEN RESERVED TO THE STATES IS SUCCESSFUL, WE MAY EXPECT FEDERAL PREEMPTION OF THE FIELDS OF INSURANCE LAW, CONTRACT LAW, FAMILY LAW, JUVENILE LAW, AND MANY OTHERS.

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[26] SEE, E.G., TITLE I, SECTION 102(9), "REASONABLY NEEDED PREVENTATIVE CARE," "GENERALLY ACCEPTED AS APPROPRIATE"; TITLE I, SECTION 102(10), "INTRINSIC ECONOMIC VALUE"; TITLE I, SECTION 102(15), "TEMPORARY TRANSFER OF CONTROL"; TITLE I, SECTION 102(17), "APPROPRIATE SUBSTITUTE WORK"; TITLE II, SECTION 207 "NON-ECONOMIC DETRIMENT."

[27] THIS PROPOSED LEGISLATION HAS BEEN OPPOSED BY THE NATIONAL GOVERNORS ASSOCIATION, SEE LETTER, CHAIRMAN SCOTT M. MATHESON (GOVERNOR, UTAH) TO SENATOR ROBERT W. KASTEN, JR., DATED SEPTEMBER 30, 1982; AND ALSO BY THE NATIONAL CONFERENCE OF STATE LEGISLATURES, SEE LETTER, PRESIDENT WILLIAM PASSANNANTE TO SENATOR ROBERT W. KASTEN, JR., DATED SEPTEMBER 15, 1982.

Time will not permit me to discuss in depth another concern of state judges: the encrusted concept that state courts are capable of trying diversity cases involving $9,900 but are hopelessly inadequate to cope with such cases if the amount in issue is $10,100. At the same time, state courts routinely are deciding non-diversity cases involving millions of dollars and the same issues.[28] Meanwhile, these cases clog the federal courts--20 percent of the non-criminal federal case load[29]--and federal judges continue to "try state cases and apply state law."[30]

Granting diversity jurisdiction to the federal courts is as "archaic" today as it was when Roscoe Pound so branded it in his historic 1906 speech entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."[31] The common wisdom holds that this long overdue reform is frustrated by a combination of the forum-shopping proclivity

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[28] See McKusick, "A State Judge's View on Diversity Jurisdiction," in *Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come?* National Legal Center for the Public Interest 31 (1983).

[29] As of June 30, 1984, the diversity jurisdiction cases pending in federal district courts for more than three years totaled 6,169, of which 4,476 were tort cases. 1984 Director of the Administrative Office of the United States Courts Ann. Rep., table 32.

[30] Chief Justice Warren E. Burger *1983 Year-End Report on the Judiciary*, 6.

[31] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, *reprinted in The Pound Conference: Perspectives on Justice in the Future* 337, 347 (A. Levin & R. Wheeler eds. 1979).

OF A POLITICALLY POTENT SEGMENT OF THE BAR, AND THE ACQUIESCENCE OF NUMEROUS FEDERAL JUDGES WHO WELCOME THE SUPPORT AND CONCERN OF THOSE LAWYERS TOWARD FEDERAL JUDICIAL SYSTEM GOALS. THE QUESTION REMAINS WHETHER THE TAXPAYERS SHOULD FOOT THE ~~BILL FOR~~ AN INEFFECTIVE AND EXPENSIVE WAY OF DISPOSING OF THEIR CONTROVERSIES.[32]

IT IS AT SEMINARS LIKE THESE THAT THE PROBLEMS OF STATE AND FEDERAL JURISDICTIONS, AND THE TENSIONS OF HABEAS CORPUS REVIEW AND PROPOSED FEDERAL LEGISLATION TO NULLIFY STATE LAW, SHOULD AND CAN BE EXPLORED. THE BROOKINGS INSTITUTION'S ROLE IN BRINGING US TOGETHER FOR THIS DIALOGUE UNQUESTIONABLY IS IN THE PUBLIC INTEREST. ON BEHALF OF STATE COURT JUDGES, I THANK THE INSTITUTION FOR ITS LEADERSHIP, AND OUR MOST IMPRESSIVE AUDIENCE FOR ITS ATTENTION.

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[32] DIVERSITY CASES ORDINARILY INVOLVE PERSONAL INJURY DAMAGE ACTIONS AND CONTRACT DISPUTES, ALL INVOLVING STATE LAW INTERPRETATIONS. THIS IS AN AREA OF STATE COURT EXPERTISE, NOT FEDERAL QUESTION OR FEDERAL COURT EXPERTISE. THIS RESULTS IN DUPLICATIVE EXAMINATIONS OF RELATED ISSUES: A FEDERAL SEARCH AND DETERMINATION THERE ARE NO CONTROLLING STATE STATUTES OR PRECEDENTS, FOLLOWED BY A STATE COURT RESOLUTION OF A CERTIFIED QUESTION, FOLLOWED BY FURTHER FEDERAL COURT PROCEEDINGS.

Conference of Chief Justices

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October 2, 1985

The Honorable Strom Thurmond
Chairman, Committee on the
Judiciary
2226 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

To show its strong and continuing support for legislation that would limit federal habeas corpus review of state convictions the Conference of Chief Justices recently updated its policy position to include support for S. 238, 99th Congress.

A copy of the updated resolution, adopted August 8, 1985 at the Conference's annual meeting in Lexington, Kentucky, is enclosed with the request that it be made part of any hearing record on S. 238.

Sincerely yours,

Harry W. Swegle
Washington Liaison

Encl:

Reply to:

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RESOLUTION XIV

Update of Policy Position of Habeas Corpus Legislation

WHEREAS, a substantial number of duplicative, overlapping, and repetitive reviews of state criminal courts unduly prolong and call into question state criminal proceedings without furthering the historic purpose of the writ of habeas corpus; and

WHEREAS, the Conference of Chief Justices, at its Annual Meeting held on August 5, 1981, approved the general principles of legislation to modify federal habeas corpus procedures on petitions from state prisoners; and

WHEREAS, the Conference of Chief Justices has since repeatedly endorsed legislation which would modify federal habeas corpus procedures on petitions from state prisoners; and

WHEREAS, the Conference of Chief Justices supports the provisions now embodied in S.238, 99th Congress.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices concludes that enactment of the general principles of S.238, 99th Congress relating to habeas corpus proceedings will contribute to the orderly and timely presentation of claims on behalf of state prisoners, enhance the finality of state criminal processes, and assure proper respect for state court factual and legal determinations; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices respectfully reaffirms its recommendation to the Congress that it enact the general principles contained in S.238, 99th Congress and any companion House bill; and

BE IT FURTHER RESOLVED that each state through its Chief Justice, provide to the National Center for State Courts a statement or resume of facts and figures which show the degree of abuse arising from present federal habeas corpus procedures; and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to each member of the United States Senate and House of Representatives Judiciary Committees; and

BE IT FURTHER RESOLVED that the Board of Directors of the Conference of Chief Justices urge members of the Conference to contact their senators and representatives in Congress to support S.238, 99th Congress; and

BE IT FURTHER RESOLVED that, in addition, each Chief Justice send a copy of the Resolution to each member of the Senate and of the House of Representatives from the state served by the Chief Justice, and report that action to the National Center for State Courts.

Adopted as proposed by the Ancillary Committee on Federal Review of State Court Convictions of the Conference of Chief Justices at the 37th Annual Meeting in Lexington, Kentucky on August 8, 1985.

August 8, 1985

Addendum A to Resolution XIV

(Explanatory Background of S. 238)

1. When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted.

2. A one-year period of limitation applies to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

3. An application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court may not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant.

4. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court may not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.

5. When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted.

7. The essence of the proposed legislation is that it would:

   a. prevent frivolous claims;

   b. it would prevent (with some constitutional exceptions) application for habeas corpus in federal court where the petitioner failed to raise the issue or claim in the state court;

   c. prevent readjudication in federal court of both factual and legal questions previously adjudicated in state court proceedings, unless the petitioner shows actual prejudice; and

   d. establish reasonable time limits within which a federal habeas corpus action must be commenced.

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Senator HEFLIN. Senator Thurmond, Senator Leahy and I have asked some questions. I have concluded; Senator Leahy had to leave.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. I want to apologize for not being here at the beginning of the hearing. Senator Dole suddenly called a very important meeting on the question of the deficit, and I stayed for a while and left. I am glad to be here now, but I have got another hearing on the way, and if the distinguished Senator from Iowa could finish this hearing, I would appreciate it.

Senator Heflin, I appreciate your being here.

The Democrats, the minority on the committee, requested this hearing, and we are glad to give it to them, and we hope that this hearing will conclude and allow us to go forward.

The purpose of this hearing is to hear testimony on S. 238, a bill to reform the Federal habeas corpus statute. S. 238 is identical to S. 1763, a proposal that passed the Senate last year by a vote of 67-to-9. Four hearings were held on S. 1763 in May 1983, and several days of hearings were held in the 97th Congress on similar bills.

Current habeas corpus law presents at least three major problems that are addressed by S. 238. Because there is no statute of limitations in current law, State prisoners can file petitions for habeas corpus years after the alleged abuses take place. The resulting lack of finality in criminal cases contributes to the alarming disrespect that Americans have for our criminal justice system.

For instance, in my State, a young girl was raped and killed 7 years ago, and the State was not finally in until just a few months ago.

Current law also provides what is in effect Federal appellate review of each State criminal proceeding, despite the opportunities for direct review by the State appellate courts and the U.S. Supreme Court. This system impugns the dignity and the integrity of our Nation's State courts, whose judges are quite capable of interpreting and applying the United States Constitution that they and their Federal counterparts swear to uphold.

Third, the more than 8,000 habeas corpus petitions filed each year by prisoners convicted in State courts cost our Nation millions of dollars. Each petition, no matter how trivial or stale, must be reviewed by a Federal judge, a United States Magistrate, or their law clerks. In addition, the States must assign attorneys to respond to each petition, even though the same allegations have been made and disposed of in the State courts.

Certainly, we all want to assure that no one suffers injustice at the hands of our Nation's courts, but we cannot guarantee anyone a perfect trial, only a fair one.

The reforms in S. 238 address these problems by providing a statute of limitations, by requiring the exhaustion of State remedies, and by requiring deference to full and fair adjudication of issues by State courts. It is important legislation that deserves our prompt consideration.

The committee will certainly benefit from the statements of the distinguished witnesses today, and I want to thank all the witnesses for coming and testifying at this hearing.

The testimony here will be considered, along with the testimony of previous hearings, and we hope the committee will take action soon.

[Statements follow:]

AMERICAN BAR ASSOCIATION

STATEMENT

of

PHYLIS SKLOOT BAMBERGER

on behalf of the

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

concerning

S. 238, HABEAS CORPUS LEGISLATION

October 8, 1985

Mr. Chairman and Members of the Committee:

The American Bar Association is pleased to appear before you to express our views on the subject of S. 238, legislation entitled, "To Reform Procedures for Collateral Review of Criminal Judgments." My name is Phylis Skloot Bamberger. As a member of the Council of the ABA Criminal Justice Section, I have been designated by ABA President William W. Falsgraf to represent the Association.

I am Attorney-in-Charge of the appeals unit of the Federal Defender of the Legal Aid Society of New York City. In that capacity, my colleagues and I represent habeas corpus petitioners in the district courts, the Court of Appeals, and the Supreme Court. As counsel in these cases we have been involved with every aspect of habeas corpus procedure, including evidentiary hearings, and have been concerned with the procedural and substantive issues that arise in habeas corpus cases.

The American Bar Association reflects the legal profession as a whole, and similarly, the Section of Criminal Justice is representative of all segments of the criminal justice system. Our members include state and federal prosecutors, private defense lawyers, public defenders, judges, law professors, and law enforcement officials.

INTRODUCTION

The American Bar Association supports the statutory scheme for habeas corpus currently in effect. The Association opposes the proposed legislation, S. 238, because it does not address the real problems in habeas corpus proceedings, it ends virtually all access to federal courts by way of habeas corpus, and it is based upon faulty legal premises, misused statistics and mistaken policy concerns. Most significantly, we are concerned that while the unambiguous language of S. 238 denies access to the federal courts, those concerned with the meaning and impact of the bill will be mislead by the applicable legislative history, S.Rep.No. 92-226 (98th Cong., 1st Sess. 1983)(which was prepared for S. 1768, the identical preceding bill)(hereinafter "Report"), and wrongly convinced that the bill's language can be modified by the Report so that S. 238 means something quite different from what it actually says. Even if the Report's rewriting of S. 238 succeeds, that meaning is unacceptable under the Constitution.

Further, the Report refers only to the judges and states attorneys who supported the prior identical bill. Omitted is reference to those who testified at the April 1982 hearings in opposition to the habeas corpus legislation and to the opinion of others opposing the legislation, including the American Bar Association. By so doing the Report suggests there is a lack of concern about and opposition to this bill, which is certainly not the case.

Indeed, the Report cites as support for its position Justice Steven's dissenting opinion in Rose v. Lundy, 455 U.S. 509, 546 (1982). The Justice's complete words, however, are fundamentally at odds with the plan and effect of this bill and identifies the writ as "a fundamental guarantee of liberty":

> In recent years federal judges at times have lost sight of the true office of the great writ of habeas corpus. It is quite unlike the common law writ of error that enabled a higher court to correct errors committed by a nisi prius tribunal in the trial of civil or criminal cases by ordering further proceedings whenever trial error was detected. The writ of habeas corpus is a fundamental guarantee of liberty.
>
> When [habeas corpus relief is confined to cases that truly involve fundamental unfairness] there should be no question about the retroactivity of the constitutional rule being enforced. Nor do I believe there is any need to fashion definitions of "cause" and "prejudice" to determine whether an error that was not preserved at trial or on direct appeal is subject to review in a collateral federal proceeding. The availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim.
>
> The "total exhaustion" rule the Court crafts today demeans the high office of the great writ. Perhaps a rule of this kind would be an appropriate response to a flood of litigation requesting review of minor disputes. An assumption that most of these petitions are groundless might be thought to justify technical pleading requirements that would provide a mechanism for reducing the sheer number of cases in which the merits must be considered. But the Court's experience has taught us not only that most of these petitions lack merit, but also that there are cases in which serious injustice must be corrected by the issuance of the writ. In such cases, the statutory requirement that adequate state remedies be exhausted must, of course, be honored. When a person's liberty is at stake, however, there surely is no justitification for the creation of needless procedural hurdles.
>
> Procedural regularity is a matter of fundamental importance in the administration of justice. But procedural niceties that merely complicate and delay the resolution of disputes are another matter. In my opinion the federal habeas corpus statute should be construed to protect the former and, whenever possible, to avoid the latter.

Finally, it is important to note that those who will be affected by denial of access to the federal courts are for the most poor and uneducated, and many are illiterate and non-English speaking. A high proportion are minority groups members[1] with little appreciation of the judicial process they have passed through. Many were represented at trial and on appeal by assigned lawyers who were inexperienced at criminal trial practice, unfamiliar with criminal law issues and procedures, and minimally paid.[2] Many habeas petitioners were subjected to very long delays before their cases were reviewed by state appellate courts, and until the new decision in Evitts v. Lucy, 105 S.Ct. 850 (1985), were not even assured of the right to competent appellate counsel. These people file their petitions for habeas corpus, with rare exceptions, without the aid of counsel, legal assistance, or access to legal research material, and without the records of their cases. These *pro se* petitions usually disclose little comprehension of the complex legal issues involved, of the importance of setting out the significant facts, and of the need to explain compliance with state procedures.

THE SIGNIFICANCE OF THE WRIT AS A REMEDY

Proponents of S. 238 regularly reiterate that many habeas corpus petitions are frivolous. They therefore seek to limit access to federal courts by all petitioners.

A most important consideration in any discussion of whether access to federal courts by all should be virtually eliminated is the significance of habeas corpus as remedy against violation of constitutional rights. Basic rights which provide the cornerstone of our criminal justice system have historically been protected through habeas corpus proceedings because Supreme Court review is limited to a few cases each year. Recent cases demonstrate that continued federal protection is essential to the control of official unconstitutional behavior. A short sampling of significant precedents will illustrate this point:

> Johnson v. Zerbst, 304 U.S. 458 (1938), the Sixth Amendment right to counsel and the standard for review;
>
> Jackson v. Denno, 378 U.S. 368 (1964), prohibited use of physically coerced confessions;

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[1] In 1982, 47% of the state prison population was black and blacks made up more than 50% of the Southern prison population. Prisoners in State and Federal Institutions on December 31, 1982, at 6-7 (Bureau of Justice Statistics, Department of Justice, 1984).

[2] This is confirmed by information in issues of Indigent Defense Information, the publication of the American Bar Association, Standing Committee on Legal Aid and Indigent Defendants: Bar Information Program.

Mullaney v. Wilbur, 421 U.S. 684 (1975), prohibits presumption shifting the burden of proof to the defense;

Davis v. Zant, 721 F.2d 1478 (11th Cir. 1983), *aff'd on rehearing*, *Davis v. Kemp*, 752 F.2d 1543 (11th Cir. 1985); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983); *Marchetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), gross unrepresentation of blacks and women on the jury pool;

Peek v. Kemp, 746 F.2d 672 (5th Cir. 1984); *Green v. Zant*, 715 F.2d 551 (11th Cir. 1983), jurors refusing to vote guilty forced by fellow jurors to excuse themselves due to illness;

Anderson v. Warden, 696 F.2d 296 (4th Cir. *en banc* 1982), judge took witnesses to chambers and pressed them to change their testimony;

Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), exculpatory witness for the defense deliberately concealed by a police detective;

Lockett v. Blackburn, 571 F.2d 309 (5th Cir. 1978), prosecutor paid two defense witnesses to leave the area;

Clarke v. Blackburn, 632 F.2d 531 (5th Cir. 1981), two informants sent by police on another transaction making them unavailable for the defendant's trial;

Henson v. Wyrick, 634 F.2d 1080 (8th Cir. 1981) and *Thompson v. White*, 680 F.2d 1173 (8th Cir. 1982), hand selection by sheriff of potential jurors who he thought would make "good jurors."

Westbrook v. Zant, 743 F.2d 764 (11th Cir. 1984), lawyer representing the state in a suit against its jury selection system fails to raise the issue of the jury selection for his criminal defendant client;

Williams v. Franzen, 687 F.2d 944 (7th Cir. 1982); *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981); *Camera v. Fogg*, 658 F.2d 80 (2d Cir.), cert. denied, 454 U.S. 1129 (1981), one counsel represents several defendants with conflicting defenses;

Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982), in violation of double jeopardy, state sought to retry the defendant, although his case had been reversed on state appeal for failure of proof;

Silverstein v. Henderson, 706 F.2d 361 (2d Cir. 1983), evidence that a retarded and illiterate defendant was not competent to plead guilty six year earlier;

Hawkins v. LeFevre, 758 F.2d 866 (2d Cir. 1985), use of silence at arrest to prove guilt is unconstitutional;

Farmer v. Harris, 84 Civ. 1482 (S.D.N.Y. 1985), change in prosecution theory after jury begins deliberations and the defense cannot respond is prohibited.

These cases represent only a small and random sampling of the issues basic to the fairness of the criminal process which regularly come before the courts on habeas corpus. Most of these cases would never reach the federal courts if S. 238 were enacted. It is particularly interesting that even this small sample demonstrates that similar types of misbehavior recur over the years and that not even the threat of federal oversight deters some forms of unconstitutional behavior.

The argument to restrict or deny access because so many habeas corpus petitions are frivolous appears based on the conclusion that all writs which are denied are frivolous. However, a distinction is made in the cases between frivolous claims and those which are arguable and have merit, but do not justify relief. Many petitions are denied, not because they are frivolous, but because despite merit the numerous considerations which go into affording relief do not ultimately justify the final step of a new trial or release. These cases, like all other matters before the courts, require careful consideration of facts and law. The unique respect given to state court fact findings in habeas corpus cases adds another dimension for consideration and denial. See Rushen v. Spain, 464 U.S. 114 (1983); Marshall v. Lonberger, 459 U.S. 422 (1983); Sumner v. Mata, 455 U.S. 591 (1982); Sumner v. Mata, 499 U.S. 539 (1981).

In part, the reason for the denial of many petitions has been changes in federal substantive law. Recent federal decisions have restricted constitutional protections, particularly in the areas of self-incrimination, double punishment, judicial and prosecutorial misconduct, counsel competence, and jury instructions and jury misconduct. The most far-reaching modification has been in the level of prejudice required before relief will be granted for constitutional error. Another reason for denial of writs is that many petitioners, acting without counsel, are simply unable to prepare petitions and present claims so as to reveal the basis for relief under the legal standards, particularly on the issue of prejudice. Pro se petitioners find it difficult, if not beyond their ability, to explain that they have complied with procedural requirements for access to the federal courts. This is particularly true for the required showing that state procedural rules have been met. Our experience is that states' attorneys interpose absurd, and often incorrect, interpretations of state law, and that pro se petitioners simply do not have the knowledge or ability to prepare a response. Thus, some petitions considered frivolous by the courts are in fact not so and a clear and adequate explanation of the claims would show them to present significant issues properly before the court. We have found this to be the situation in many cases to which we are assigned.

Finally, there are a group of petitions which are not properly before the courts because no federal claim is presented or because of a procedural bar. In these cases, the petition or claim should be withdrawn before the judge even examines the case. In our experience, many petitioners are agreeable to withdrawing the petition or claim if the defect in the position is made clear to the petitioner. In those instances in which the petitioner refuses to withdraw a frivolous claim, Anders v. California, 386 U.S. 738 (1967), provides a key. Under Anders, if an attorney representing a client on appeal, having full knowledge of law and fact, believes the case to present only frivolous issues, the attorney may so advise the court in a full explanation. The court, after independent examination, may dismiss the case.

Many of the problems can be resolved by making available counsel who will prepare properly drafted petitions or, in frivolous cases, advise withdrawal of the claims or petitions, or alternatively file a brief comparable to that allowed in Anders.

POLICY CONSIDERATIONS CITED TO SUPPORT THE LEGISLATION

The policy concerns of the proponents of limitation on habeas corpus have been articulated in the Report. These concerns are not justification for passage of S. 238.

1. Friction Between State and Federal Judges

The Report (at 3 and 4) cites as a policy concern the friction between state and federal judges allegedly generated by habeas corpus procedures. This friction is inherent in any system of interrelated governmental structures. It exists between Congress and the Executive Branch, between the federal courts and Congress, between the various levels of the federal courts, between executive agencies, between federal cabinet officials and state governments, between local and federal officials. The fact that this list can be expanded virtually without end demonstrates that frictions between social and political structures are natural.

The usual existence of such frictions is not negative, but is a valuable check within the system. Here, the writ of habeas corpus helps to protect individuals against infringement of their federal constitutional rights by public officials who are antagonistic to those rights. The public interest in preserving constitutional rights is of greater import than consideration of whether judges of different jurisdictions suffer a personal pique based on review of their work. Indeed, like all of us, judges do make mistakes. The danger due to judicial error is greater because of judicial power. The oversight system is a check on that power.

In reciting the expected benefits of S. 238, the Report (at 27) quotes Justice O'Connor on the benefit of deference to the state courts and finality of their judgments. It must be noted, however, that Michigan v. Long, 103 S.Ct. 3469 (1983), written by Justice O'Connor, reversed the 38-year-old Supreme Court precedent of Herb v. Pitcairn, 324 U.S. 117 (1947). Under Herb an independent and adequate state ground as the basis for a state decision precluded federal review of the state decision even if the state court spoke about federal constitutional issues; only if the federal question was essential to the decision in the case did the Supreme Court review the state court decision and the presumption favored the adequate and independent state grounds. South Carolina v. Neville, 103 S.Ct. 916, 925 (1983)(Stevens J., dissenting).

Long reversed the presumption of adequate independent state grounds and applied a presumption against state law basis for decision-making even though a state court cites its own constitution. Long provided that when the Supreme Court decides that the state law basis of the decision is unclear, presumption is that federal law either compelled or was the basis of the result. Justice Stevens dissented, criticising the presumption as one undermining respect for the state courts, resulting in advisory opinions, using scarce judicial resources, and causing inappropriately early Supreme Court intervention. In light of this reversal of the Herb presumption, the claim that S. 238 is motivated by rankling between federal and state judges must be viewed with skepticism.

In this discussion of judicial friction, the Report also notes (at 3) that state judges resent having their decisions overturned by a single federal judge. However, if a petition for writ of habeas corpus is granted, the State has an automatic right of appeal to the appropriate federal Court of Appeals, and if not successful there, may apply to the Supreme Court of the United States. Thus, the state court judges' decisions in a case are not overturned by a single, lower federal judge. By comparison, a petitioner whose habeas corpus application is denied may appeal that denial only by permission. Thus, while a single federal judge may deny a writ, that judge is not solely responsible for granting one if the state wants review.

Furthermore, the review by federal judges, appointed for life and presumably not subject to political pressures, and therefore more able to render decisions free of public pressure, is itself justification for federal oversight.

2. Judicial Overload

Advocates of restriction assert that a large number of habeas corpus petitions are filed, requiring the expenditure of substantial federal judicial time. The Administrative Office of the United States Courts reports, however, that for the year ending June 30, 1984, state prisoners filed 8,335 habeas corpus petitions, down from 1983. These represent a mere 3.3% of the total of 251,485 federal civil filings and less than one-seventh of the 56,586 state law diversity of citizenship cases filed. Further, 7,883 habeas corpus petitions were disposed of without court action or before pretrial proceedings. Only 138 went to trial, of which 134 took two days or less to try. This compares to a total of 14,374 civil trials, of which 4,939 took more than two days to try.

While total civil filings increased by 45,292 cases between 1982 and 1984, the percentage of state prisoner petitions to the whole declined by .6%.

3. Respect for State Decisions.

The decisions of the Supreme Court require that a petitioner present the factual basis for the federal claim and the federal theory to the state courts for consideration prior to presenting the claim to the federal courts (Picard v. Connor, 404 U.S. 270 (1971)), and that proper state procedures be used to present that claim to the state courts. Wainwright v. Sykes, 433 U.S. 72 (1977). Absent these requirements, federal courts will not generally review the claims, although there are some exceptions. If the issue has been presented to the state courts, the state fact findings are presumed correct (see cases ante at 6). These cases fully protect state court decisions, preclude efforts to avoid the state courts, and require that the states be given first opportunity to consider the issue.

The importance of the exhaustion requirement is fully appreciated by petitioners. In a study done of a group of "petitioners," 81% of petitioners whose writs were pending were having or had direct state appeals, 98.6% of petitioners whose habeas cases were on review in federal courts had direct state appellate review, and 44% of petitioners had a collateral attack in state courts, and 20% had filed more than one. Habeas Corpus at 6 (Bureau of Justice Statistics, U.S. Department of Justice, 1984).

PROVISIONS OF S. 238

1. Section 5a (§2254(d))

The most restrictive provision is proposed Section 2254(d), the full-and-fair adjudication provision. This section will preclude federal court consideration of the merits of a federal constitutional claim fully and fairly adjudicated by state courts. The language precludes consideration of whether the state decision was correct. Because under the bill the correct legal result is unnecessary to a preclusion based on a full and fair adjudication, federal constitutional rights as previously determined by the Supreme Court or federal courts of appeal may be violated and individuals left without recourse.

It is clear from this result that an individual's federal constitutional rights would be unprotected due to this provision. Equally disturbing is the fully predictable more general impact of this provision. Because there will be no requirement of a uniform application of federal constitutional principles of law, constitutional rights will undoubtedly vary from state to state, depending on local philosophies and politics. Thus, it is possible to have 50 interpretations of federal constitutional provisions. The residents of the same state will also be subject to unequal application of federal constitutional doctrine, the result variable depending upon the individual state judge, unless state supreme courts accept review to reconcile conflicting federal law rulings.

The second predictable result of the proposal is the loss of the traditional "constitutional floor" provided by adherence to U.S. Supreme Court constitutional interpretations. The essence of federalism here is that the federal constitution provides a level of protection for individual rights below which the states may not go. The states are free to evolve state constitutional protections affording greater safeguards for the individual, but the state may not reduce protections below those of the federal constitution. In a structure such as the one proposed, there will be a theoretical floor set by the Supreme Court in the few decisions coming to it from state courts of highest jurisdiction. However, the application of constitutional doctrine as articulated by the Supreme Court or the lower federal courts will not be generally enforced as in the past through habeas corpus or the possibility of federal review through habeas corpus.

Ironically, the effect of the proposed legislation will be to produce a diversity of treatment of the type that the Congress criticized in federal sentencing and which it sought to correct by new sentencing guidelines included in the Comprehensive Crime Control Act of 1984. Diversity in federal constitutional protection should be of no less thoughtful concern than in federal sentencing.

The full and fair adjudication concept is taken from Stone v. Powell, 428 U.S. 465 (1976), in which the Supreme Court held that issues of search and seizure arising under the Fourth Amendment would not be examined by federal courts on habeas corpus review because the remedy -- the exclusion of the evidence seized -- was not a constitutionally derived cure and was only a deterrent against illegal police activity which was effectuated by state court proceedings challenging the search and seizure. The Court has thus far not expanded the Stone rule to apply to what may be called errors of constitutional dimension. There is no doctrinal basis for applying the full and fair adjudication doctrine to constitutional rights.

Advocates of this legislation assert that the just-described understanding of S. 238 is incorrect because, despite the statutory language, the Report requires that the federal court examine the state decision to determine its "reasonableness" on issues of law, fact, and application of law to fact. This portion of the Report is derived from the Department of Justice submission to the Senate dated March 3, 1982, and reprinted in hearing on S. 2216, Committee on the Judiciary of the United States Senate (97th Cong. 2d. Sess. April 1, 1982). However the position articulated in the Report is not incorporated into the bill, nor is there reason to believe the assurance that the courts will have the power to interpret the language of the bill in accord with the Report. Consequently, assurance in the Report that substantive issues considered by the state courts will be re-examined by the federal courts is unfounded.

The full and fair adjudication language of proposed Section 2254(d) is a term of art understood by all to refer to judicial procedure. That term has an understood meaning, as is fully acknowledged by the Report. Indeed, it is legislatively codified in the current 2254(d).

The Report (at 24) explicitly redefines this term of art to apply to the substantive decisions in the case. Then the Report sets out the judicial analysis required to apply the new definition. Thus, proponents of the legislation argue that S. 238, if passed, will include the entire scheme for adjudicating cases as included in the Report even though the Report will never have been voted upon. This attempt to legislate by evading the legislativep rocess is impermissible.

Furthermore, the constitutional requirements for passing legislation cannot be avoided by the argument that the Report constitutes legislative history that the courts will use in interpreting and applying S. 238. Decisions of the Supreme Court state that when the court "find[s] the terms of a statute unambiguous, judicial inquiry is complete," United States v. Oregon, 366 U.S. 643, 648 (1961), "except in 'rare and exceptional circumstances.'" Rubin v. United States, 449 U.S. 424, 430 (1981), quoting TVA v. Hill, 437 U.S. 153, 187 n.33 (1978); Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). A court should ignore the clear language of a statute only when "acceptance of the meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute," Trans Alaskan Pipeline Rate Cases, 436 U.S. 631, 643 (1978), or would "produce a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

Here, the language of the statute is unambiguous and its terms, well defined by the Supreme Court and incorporated in current statutes, are known to refer to procedural issues and not substantive ones. Further, the use of the new definition and scheme for review of the substantive decision which is created in the Report is totally inconsistent with the intent and purpose of the statute as set out in the Report. The Report (at 4) states that the present system of habeas corpus is "a gigantic waste of effort," that it involves "duplication of judicial effort" when federal courts are strained by criminal case loads (Report at 5), that it involves mandatory readjudications that result in pointless and duplicative relitigation of claims (Report at 6), and that readjudication defies common sense and sound judicial policy (Report at 23). The Report says the intent of S. 238 is to end relitigation and to reduce court time involved in habeas corpus cases. According to the Report problems will be solved because "reform is likely to make it possible to decide cases more easily and with less extensive litigation" (Report at 6) and that proposed legislation would abbreviate and simplify litigation in habeas corpus cases (Report at 28).

However, the so-called reform created in the Report, but not in the legislation, will produce the opposite result. According to the Report, the legal scheme requires deference to the state court opinion

> . . . when, in the Federal courts' own estimation, such differences as they may have with the State courts reflect at most reasonable differences of opinion concerning the interpretation or application of Federal law, or pertinent factual conclusions, in cases in which the proper determination is unclear.

(Report at 24). The question posed by this scheme is how the federal judge is to determine whether he has the kind of difference of opinion with the state judge that merits review of the substantive issue. It appears that the federal judge must make four or more decisions: Is the proper determination of the case unclear? If so, does the federal judge have a more than reasonable difference of opinion on legal issues? On factual issues? On mixed law and fact questions? If the state opinion is deemed unreasonable on any of these three, what is the constitutionally correct decision? There is no guidance as to what makes a decision unconstitutional but reasonable or what factors are to be considered in deciding whether a state judge is reasonable. May a judge's opinion be reasonable if based on fiscal, political, social or philosophical considerations? Traditional legal analysis, scornfully defined in the Report as "hairsplitting" (Report at 28), is simply transferred to the new application of the word reasonable, one that has never before been used in a context such as this. This new scheme does not reduce the alleged complexity of habeas corpus proceedings; it does the opposite and thus the legislative history cannot change the meaning of S. 238's language.

Furthermore, the Report itself presents an ambiguous scheme for adjudication on the merits. It says in one instance that the reasonableness standard precludes review if the proper determination is unclear (Report at 25); on the other hand, a later explanation imposes no limit on the application of the reasonableness doctrine (Report at 27), appearing to preclude federal consideration of an issue if the state court is wrong even if federal law is clear. This ambiguity in the Report precludes its use to rewrite the meaning of the words of the statute. United States v. Oregon, supra. In sum, the Report misleads its reader into thinking that the legislation has a meaning different than that conveyed by its language. The language in effect bars access to the federal courts for consideration on the merits of the federal constitutional issues.

However, even if the statute can quite literally be rewritten by its legislative history, the application of the reasonableness standard to decisions on questions of law or to mixed questions of law and fact is unconstitutional and inappropriate. As the Report notes (at 27), state judges take an oath to support the Constitution of the United States. So do federal judges. And adherence to the scheme created in the Report would mandate violation of the oath by compelling federal judges to refrain from overturning those decisions they consider to be constitutionally infirm, albeit not unreasonable. This action taken by the federal judge would violate the supremacy clause.

Furthermore, it appears that the basis of a reasonableness finding can be non-legal concerns, thereby interjecting into constitutional analysis irrelevant political or social factors. Thus, for example, it may be viewed as reasonable, in a fiscal sense, for an indebted community to save public funds by having multiple defendants represented by the same counsel. However, the multiple representation would be constitutionally defective if a conflict affected the representation, even though it was reasonable under the fiscal circumstances.

2. Section 5(c) of (§2254(d))

The flip side of the bill's denial of access for claims considered by the state courts is the denial of access if the issue has not been presented to the state courts in accordance with required state practice. This limitation, called procedural default, is a greatly revised codification of the decision in Wainwright v. Sykes, 433 U.S. 72 (1977).

The bill codifies the *Wainwright* rule by revising it to make it a procedural strait-jacket. While the codification as expressed in the language of the bill appears to adopt *Wainwright* to bar all federal examination of issues if there was a procedural default except for cause and actual prejudice, the Report, once again changing the apparent meaning of the language, substantially revises the bill. The bill, either as written or as reinterpreted by the Report, is not justified on policy grounds and raises substantial constitutional questions.

The policy justification for S. 238 is that at present the *Wainwright* rules are "beset with fundamental uncertainties" (Report at 7; see also Report at 8) and problems (Report at 12), and the bill would avoid the need to resolve the problems through case law development (Report at 8). However, the Report, which was written in 1983, obviously is unable to deal with the most recent judicial decisions, which do resolve some of the so-called uncertainties, and with new constitutionally based decisions that S. 238 and the Report will make hopelessly complex issues.

What is quite amazing to those of us involved in the litigation process is the speed with which definitive interpretations of the *Wainwright* principles have come through judicial decisions, and the relative consistency of those interpretations. In the eight years since *Wainwright*, it has become clear law that counsel's failure to preserve an issue in trial court proceedings will not constitute "cause" unless the issue is one which counsel could not have known about at the time the error was made because there was no law upon which to base a legal argument. If "the tools" for making a legal objection were available, counsel's failure to do so is not cause. This rule, explored first in *Engel v. Isaac*, 456 U.S. 107 (1982), was re-examined and applied in *Reed v. Ross*, 52 U.S.L.W. 4905 (S.Ct. June 26, 1984).

On the question of what constitutes an excuse or cause for not following state procedures, S. 238 as rewritten by the Report, does not assist the legal development that is underway in the Courts. Rather, it creates a rule which makes judicial decisions irreconcilable. This comes about because the Report (at 13) rewrites the bill to include as cause the incompetence of counsel under Sixth Amendment standards. But the Supreme Court decision in *Strickland v. Washington*, 104 S.Ct. 2052 (1984), decided since the Report was written, redefined Sixth Amendment incompetence. Under Strickland, counsel's conduct constitutes incompetence if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 104 S.Ct. at 2068. This test for prejudice is different from the required level of prejudice due to other constitutional errors. See, discussion of levels of prejudice in United States v. Frady, 456 U.S. 152 (1982). Therefore, S. 238 may preclude relief based on substantive constitutional error because a procedural bar cannot be overcome due to the inconsistent standards for showing "cause."

As earlier noted, the codification of Wainwright is really a revision. It would define procedural default as any failure to comply with state rules. However, it has already been judicially determined under Wainwright that there is no procedural default if the state itself excuses the failure to comply with local rules and considers an issue on the merits. Klein v. Harris, 667 F.2d 274 (2d Cir. 1981). The state's interest in enforcing its rules is said not to exist if the state itself does not require adherence to them. The blanket definition of default in the bill and the Report precludes consideration of those instances where all notions of fairness would warrant a different result.

The Report (at 15) would apply the Wainwright forfeiture standard to all constitutional errors, including those defined as "basic." Traditionally, those rights defined as basic require a knowing and intelligent waiver by the defendant (right to counsel, jury trial, entry of plea, decision to testify, and right to pursue an appeal, Jones v. Barnes, 463 U.S. 745 (1983)) (See ABA Model Rules of Professional Conduct, Rule 1.2(a) and, if they are violated, reversal occurs without a showing of prejudice (use of a coerced confession, absence of counsel, conflict of interest by counsel, denial of neutral judge or jury. United States v. Hastings, 461 U.S. 491, 508 n.6 (1983)). The Report expressly states that these rights can be lost by procedural default rather than requiring a knowing and intelligent waiver by the defendant and requires that prejudice be shown. This application of S. 238 changes the standard for constitutional waiver and is thus unconstitutional.

With this provision of the bill, as with the one on full and fair adjudication, the clear meaning of the language in the bill is changed by the Report (at 13). The bill defines cause as "state action in violation of the constitution or laws of the United States." The Report defines state action to include ineffective assistance of counsel. To justify this notion, the Report relies on Cuyler v. Sullivan, 446 U.S. 335 (1980), a case involving counsel with a conflict of interests. The language of Cuyler states:

> [t]he Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance . . . .
>
> Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

The language of Cuyler does not reach the meaning the government attributes to it. The state action in Cuyler was not the incompetent counsel, but the state's conduct of the trial with incompetent counsel. Further, the claim that incompetence of counsel is state action was rejected by the Court in Polk County v. Dodson, 454 U.S. 312 (1981), decided after Cuyler. Consequently, the Report's effort to re-define the bill's "state action" language to include counsel's action, even if it were permissible (see ante at 14) is of questionable effectiveness. While the effort to include counsel's competence was salutory it seems likely to fail. Therefore, the primary ground for cause remaining in the bill is state action. Limitation of cause to this ground is inappropriate and will work real injustice if some other reason, such as counsel's performance, the defendant's illness, state procedures that are unduly complex, or another unforeseeable factor exists as an acceptable basis for failing to use state procedures.

This discussion shows that the bill's provisions for procedural default are unconstitutional and generate more confusion than presently exists.

3. Statute of Limitations - Section 2 (§2244(e))

The bill establishes a one year statute of limitations for the filing of habeas petitions. The time is to run from the exhaustion of state remedies, the removal of a State-action bar to the filing of the petition, from the date of a Supreme Court decision recognizing a new right which is retroactive and from the discovery of a factual predicate for a claim which could not have been discovered earlier.

The justification for the statute of limitations is that petitioners deliberately delay filing their federal petitions so that, if the petition succeeds and a new trial is ordered in their case, the state will have lost its ability to conduct a retrial. There are no data to support this claim; indeed, there does not appear to be any evidence upon which it may be concluded that late filings are deliberate efforts by prisoners to sabotage further state proceedings against them. American Bar Association, Standards for Criminal Justice, Standard 22-2.4 (2d. ed. 1980)(Commentary).

Of course, the filing of the federal petition must be postponed until completion of the state appellate and post-conviction proceedings necessary to satisfy the requirement of exhaustion of available state remedies. This can often take several years.[3] Indeed in one recent case the time involved for state appeals and state collateral proceedings was six years. A recent study shows that the average time between conviction and exhaustion of state remedies was between 2.5 and 2.8 years. The same study estimated that approximately 43% of petitions would be barred by the one year statute of limitations. *Habeas Corpus*, at 7 (Bureau of Justice Statistics, Department of Justice, 1984).

A period of limitations will also necessitate successive petitions. As each separate claim is exhausted, a petition raising that claim must be filed within the statutory period but cannot include claims not yet exhausted. Because different kinds of claims are exhausted in different state proceedings, exhaustion does not occur simultaneously for all claims so that different petitions must be filed.

Any statute of limitations, especially one without a tolling provision, fails to appreciate the practical circumstances of litigants in habeas corpus cases. Virtually all such petitioners are in prison. Many are illiterate, ignorant, and confused. Some are retarded, mentally ill, insane, or physically incapacitated. Concepts of by-pass, forfeiture, waiver, and exhaustion, as well as the underlying substantive claims, are complicated ideas. For most petitioners, no lawyer or legal program is available. Although states do provide counsel for a direct intermediate appeal, counsel is not required for discretionary appeals or for state post-conviction procedures. Thus, the prisoner must prepare his case on his own or with whatever haphazard assistance he may obtain from a jailhouse lawyer. Prison law libraries are often lacking the basic volumes necessary for minimal research, but even if law books are available, prisoner access to libraries is strictly controlled and limited by prison regulations. Legal documents and books are frequently taken from prisoners during searches of cells and "shakedowns" which can be done without any reason. *Hudson v. Palmer*, 104 S.Ct. 3194 (1984). None of these circumstances would constitute unconstitutional state action under S. 238. *Bell v. Wolfish*, 441 U.S. 520 (1979). Often a prisoner's legal work is destroyed or stolen by other inmates. Finally, one of the most devastating effects of prison disturbances on inmates, whether participants or not, is the wholesale destruction of personal property, including legal papers, by inmates and guards.

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[3] In one study, the mean length of time involved in pursuing direct appeals of criminal convictions in state courts varied from 10 to 31 months. *Wasby*, et al., *Volume and Delay in State Appellate Courts: Problems and Responses* 29-32 (National Center for State Courts 1979). In 1981, a study was published involving six appellate courts and 5,900 direct appeals filed in 1975 and 1976. The average time from the lower court judgment to issuance of the appellate mandate was shown to be from 240 days to 648 days. *Appellate Court Delay* 86 (National Center for State Courts 1981).

Additional problems continually affect inmates' opportunity to prepare legal papers for filing in the federal courts. State court records, essential to prepare legally sufficient papers, are frequently not forwarded by state courts and prosecutors. Mail to and from persons outside the institution, with information relevant to the legal proceedings, may be censored or confiscated, in the interests of security.

Finally, even after designation, a prisoner may be moved from prison to prison at the discretion of corrections officials. *Olim v. Wakinekona*, 103 S.Ct. 1741 (1983). An inmate may be removed from his designated prison on a writ issued by a prosecutor for a valid reason or merely to harass. Some prisoners, for reasons valid or not, may be compelled to spend time in administrative detention or segregation, with limited access to legal materials.

In some instances petitions are not filed by district court clerks, but are returned to the prisoner because of procedural or formal defects or are accepted but not filed. These circumstances could result in failing to meet time deadlines. Suffice it to say that any statute of limitations in circumstances like these is intolerable and would constitute a denial of access to the courts.

Particularly disturbing is the philosophy implicit in the statute of limitations proposal that a petitioner may be retained in custody if a new decision is rendered holding the statute under which he stands convicted to be unconstitutional but the prisoner fails to file a petition within one year of the decision. For example, a statute may be held to violate the First or the Fifth Amendment (see Leary v. United States, 395 U.S. 6 (1969); United States v. Liguori, 438 F.2d 633 (2d Cir. 1971)). In such situations, the petitioner has committed no crime and the state is unjustified in holding him in custody. Yet, if he does not file within one year of the decision, he must remain in custody.

The constitutional issue raised by a statute of limitations is whether it violates the suspension clause. Art. I, §9, Cl.2 of the Constitution of the United States reads: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion of the public safety may require it." A statute of limitations constitutes a legislative/executive direction barring the courts from consideration of the constitutionality of custody after the limitation period has expired. Jones v. Cunningham, 371 U.S. 236, 238 (1963); Johnson v. Eisentrager, 339 U.S. 763 (1950)(Black, J., dissenting); Sanders v. United States, 373 U.S. 1, 11-12 (1963); United States v. Heyman, 342 U.S. 205 (1952). As such, it is contrary to the Constitution. An argument has been made that no constitutional problem exists because federal habeas corpus jurisdiction over state prisoners is of statutory origin and can be withdrawn by Congress. However, once Congress elects to provide a habeas corpus remedy for state prisoners, the constitutional provisions relating to habeas corpus apply and prevent suspension of the writ by a statute of limitations.

In sum, a statute of limitations is unconstitutional as a suspension of the writ and, because of the unique condition of this category of litigants, as a denial of access to the courts. It is also unconstitutional to the extent that it may permit custody of a person who has committed no crime. No evidence exists to demonstrate that delays in filing habeas corpus petitions are intentional or abusive of the process. In any event, in those cases where abuse or intent is clear, the matter may be resolved on an individual, case-by-case basis.

4. Certificate for Appeal (Section 3 §2253)

The bill permits a discretionary appeal on issuance of a certificate by a circuit judge. This proposal changes the present statute, which permits a certificate to be granted by a district judge or the circuit. The change is justified on the ground that it saves time and judicial resources. To the contrary, the requirement that the court of appeals, which knows nothing about the case, examine the entire record to determine whether an appeal should be taken will obviously take substantial time of that court. On the other hand, the district court, already familiar with the case, can make the decision to permit the appeal as part of the decision on the merits.

Further, if the court of appeals grants a certificate judges of that court will examine a case two times: one for permission to appeal and again later for a decision on the merits. Although district court consideration of the case for the two purposes is by the same judge, different circuit judges are likely to consider the case in the two procedures.

* * *

Mr. Chairman, on behalf of the American Bar Association, I would like to thank you and the Committee for inviting us to present these views. I would be pleased to answer any questions you or members of the Committee may have.

American Bar Association

February 4, 1986

Honorable Patrick J. Leahy
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Let me first thank you for the opportunity to appear before the Committee on the Judiciary on October 8, 1985 concerning S.238, habeas corpus legislation. I very much enjoyed that experience and the American Bar Association appreciated the opportunity to discuss such an important area of the law.

This letter is in response to a letter to the Committee dated November 20, 1985, from the Department of Justice. The November 20 letter was prepared to answer questions from you and Senator Biden contained in letters dated October 16 and October 23, 1985.

I would like to respond specifically to several of the Department's answers which I believe are incorrect or misleading. On behalf of the ABA, I respectfully request that a copy of this letter be made part of the formal record of the committee's hearings on S. 238.

Question 11 asks whether the tension between state and federal courts caused by habeas corpus review of state court decisions is not similar to the normal tensions between other branches of government. The Department of Justice responds that federal oversight of states by way of habeas corpus is not comparable to the checks and balances in the federal government because habeas corpus is not constitutionally authorized. The answer is unresponsive (although we dispute the Department of Justice's view on the constitutional basis for habeas corpus). The Supremacy Clause of the Constitution, Art. VI, Cl. 2, establishes the supremacy of the United States Constitution, laws, and treaties, and specially directs that state court judges are bound by United States law. The declared supremacy of federal law has traditionally been the root of tension between the state and federal courts, as well as the state and federal governments. A current source of such tension are state court rules precluding attorneys from testifying before grand juries about the source of their clients' fees pursuant to Department of Justice subpoenas under federal law enforced in federal courts. Like other "tensions" between branches of government and governments, the tension arising from federal court oversight in habeas corpus cases has a planned constitutional basis.

This issue, of course, relates to the Department of Justice's statement on page 10 that "the views of federal appellate courts on

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constitutional questions do not, of course, have any binding effect on state courts." We strongly dispute this proposition, Cooper v. Aaron, 358 U.S. 1, 18-19 (1958). However, the continued adherence of the Department of Justice to this position only emphasizes the need for habeas corpus: if the states are free to ignore federal appellate courts as they render constitutional decisions, habeas corpus is essential to provide relief in particular cases, because the U.S. Supreme Court cannot be the sole monitor of the enforcement by the states of federal constitutional rights. It has been generally made known that the Supreme Court's docket is heavy and that requests for the exercise of certiorari jurisdiction are consuming an enormous part of the Court's time. It is also known that the Supreme Court reviews on the merits only a small fraction of the cases in which appeal or certiorari is sought. Thus, to look to the Court's direct review power as the method to assure nationwide application of constitutional rights is not only unrealistic but misleading.

Of course if, as the Department of Justice asserts, the important constitutional decisions come from the Supreme Court in the exercise of its direct review power, habeas corpus is absolutely essential for the determination of whether a decision is to be applied retroactively, and if retrospective application is appropriate, the application of the rule to cases tried prior to the Supreme Court's decision.

Question 12 asks: "Isn't a statute of limitations without a tolling provision to protect against manifest injustice unconstitutional in that it might permit custody of a person who had committed no crime?" As shown by its response to that question and to Supplementary Question 2, the Department of Justice misunderstands Question 12, and its response is off the mark. The Justice Department's position is that newly discovered evidence showing innocence is an instance of manifest injustice and that it is remediable pursuant to Rule 33, which has a limitation for filing. From this, the Department concludes that a statute of limitations for habeas corpus need not include an exception for manifest injustice.

However, Question 12 does not relate to whether there is new evidence of the defendant's innocence of criminal conduct. Rather, it relates to other situations.

A judgment of conviction based on conduct in violation of a statute later held to be invalid remains in effect unless a prisoner is provided with a remedy for challenging the conviction. Continued detention of a person for conduct the law does not consider criminal is manifestly unjust and no statute of limitations bar to federal relief for such detention should be considered. For example, in United States v. Leary, 395 U.S. 6 (1969), the Supreme Court held that the statutory inference of knowledge of illegal importation of marijuana from mere possession was impermissible. Proceedings pursuant to 28 U.S.C. §2255 were required to vacate the convictions of people who had been convicted under the invalid statutory presumption prior to the Supreme Court's decision. Liguori v. United States, 314 F.Supp. 1184 (S.D.N.Y. 1969); United States v. Vallejo, 312 F.Supp. 245 (S.D.N.Y. 1970); Perez v. United States, 315 F.Supp. 972 (S.D.N.Y. 1970); United States v. Sorenson, 308 F.Supp. 1268 (E.D.N.Y. 1970).

Habeas corpus relief is necessary whenever the Supreme Court holds a statute invalid, as it recently did in Kolender v. Lawson, 103 S.Ct. 1855 (1983), to vacate convictions rendered pursuant to the statute prior to the Court's decision. A statute of limitations barring relief to a person being punished for conduct that is not criminal perpetuates a manifest injustice, and may be unconstitutional as a violation of due process.

A statute of limitations that contains no exception perpetuates a manifest injustice in those cases in which the prosecutor has failed to produce at trial any evidence of guilt or in those cases in which the evidence fails to establish guilt beyond a reasonable doubt. Under Thompson v. Louisville, 362 U.S. 199 (1960), and Jackson v. Virginia, 443 U.S. 307 (1979), conviction and punishment in each of these circumstances constitutes a violation of due process, and a bar to habeas corpus may be unconstitutional. Bozeman v. Lambert, cited in the October 8, 1985, written testimony of Legal Defense Fund, and Hawkins v. LeFevre, 758 F.2d 866, 871 n.7 (2d Cir. 1985), are cases with insufficient evidence.

Finally, a statute of limitations with no exceptions for manifest injustice would violate the Constitution if the claimed constitutional error was so serious as to place the reliability of the fact-finding ability of the jury in doubt, thus making questionable the defendant's guilt.

In each of these situations (as well as in others) there is no new evidence, as the Department of Justice hypothesizes. The full record is available without new evidence and on its face it demonstrates the injustice of the conviction and the unfairness of punishment.

The Department of Justice notes that there are time limits on filing notices of appeal for direct review, state prisoner applications for direct review in the Supreme Court, and Rule 33 motions for newly discovered evidence, and that a statute of limitations without tolling provisions is similarly appropriate for filing habeas corpus petitions. In fact, the examples contradict the Department's position. The 10-day period for filing a notice of appeal in a federal criminal case may be extended under F.R.A.P. 4(b). A proceeding pursuant to 28 U.S.C. §2255 may, under appropriate circumstances, result in a resentencing with the consequent ability to file a timely notice of appeal, and at sentencing the defendant will be advised of the right to appeal by the court, and will be represented by counsel. Circumstances are quite different for a prisoner who is in custody without counsel.

Under Supreme Court Rule 20.1, the Court can grant an extension of time to file a petition for a writ of certiorari in a criminal case from a state court of last resort, and the Court has held that "an untimely petition can be entertained and granted and the case reviewed if there are compelling reasons for overlooking the untimeliness and for granting review." Robert L. Stern & Eugene Gressman, SUPREME COURT PRACTICE 389 (5th ed. 1978). Further, even in federal cases involving newly discovered evidence, depending on the circumstances that caused the failure to discover the new evidence in time for trial, a §2255 proceeding may be an alternate remedy to Rule 33.

In response to Question 9, the Department of Justice insists that, under S. 238, federal habeas corpus courts will review state court decisions for "reasonableness and consistency with due process." We can only restate the point made earlier that S. 238 does not include reasonableness or consistency tests. Indeed, the Department of Justice has not mentioned a consistency test until now. If the statute is intended to mean that state court decisions should be consistent with Fourteenth Amendment standards, it must specifically say that, rather than permitting the opposite result. If that is what S. 238 means, it is not necessary, for that is the law now.

I appreciate the opportunity to respond to these several facets of the Justice Department's November 20 letter and hope you will call on me and the Association if we can be of any assistance to you as consideration of this legislation progresses.

Sincerely,

Phylis S Bamberger

Phylis Skloot Bamberger

PSB:dc

cc: Robert D. Evans, Director
ABA Washington Office
Laurie Robinson, Director
ABA Section of Criminal Justice

1694c

Statement of Larry W. Yackle
Professor of Law, Boston University
School of Law

on
Behalf of the
American Civil Liberties Union

in
Opposition to S. 238

"A Bill to Reform
Procedures for Collateral Review"

October 8, 1985

Statement in Opposition to S. 238 on behalf of the American Civil Liberties Union, Larry W. Yackle, Professor of Law, Boston University School of Law, 765 Commonwealth Avenue, Boston, Massachusetts 02215. (617) 353-4688*

I. Introduction

As you know, the American Civil Liberties Union is a national, nonpartisan organization dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU has consistently worked to maintain litigants' access to the federal courts for the adjudication of federal constitutional claims. Inasmuch as the bill now under consideration puts that access at risk, we take this opportunity to express our opposition to it.

This bill, sponsored in this Congress by Senator Thurmond and others but originally prepared by the Department of Justice, would amend the federal habeas corpus statutes in a variety of ways, each to be examined below. We oppose it in all but one ** of its particulars because it threatens the fundamental principle upon which federal habeas corpus has rested for decades: the proposition that persons convicted of crime in state court are entitled to at least one opportunity to litigate their federal claims in a federal forum.

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* Information for identification only.

** A Committee Report attached to an earlier version of this bill indicated an intention, through the reenactment of the key language in current law regarding the exhaustion of state remedies, to overrule legislatively the Supeme Court's unfortunate decision in Rose v. Lundy, 455 U.S. 509 (1982). If the proponents of S. 238 have that same intention, we are in full agreement. The Lundy case should be overruled for reasons given in the earlier Committee Report. S. Rep. 98-226, 98th Cong., 1st Sess. (1983).

If enacted, this bill would thwart the availability of the federal courts to enforce the Bill of Rights and the fourteenth amendment, which, of course, requires state authorities and state courts to respect the fundamental elements of the Bill of Rights. Most of those provisions are procedural safeguards in criminal cases, and it is, accordingly, in criminal prosecutions that they are typically raised and adjudicated--initially in state court. For reasons it is unnecessary to explore here, the federal courts rarely treat such claims until after the state courts have completed their work. Then, however, the federal courts are, and should be, open.

The jurisdictional basis for federal adjudication is the Habeas Corpus Act of 1867, which authorizes the federal courts to entertain claims that citizens are held in state custody in violation of federal law. The writ of habeas corpus is not an historical anomaly. Federal habeas corpus provides the adjudicative machinery for enforcing the Bill of Rights in federal court as a sequel to state court proceedings. If it were not for habeas, the most basic and cherished rights of Americans could not realistically be vindicated in the federal forum.

The importance of keeping the federal courts open to federal constitutional claims is self-evident. The federal courts surely exist to treat issues and cases in which federal interests appear. And what more important body of federal work than the enforcement of the Bill of Rights? Those who doubt the desirability of continuing habeas corpus in its present form should ponder hard whether they genuinely wish to restrict the federal courts' availability in this vital field, and to squander their resources on automobile accident cases which still routinely command the federal diversity forum.

The independence of the federal courts makes it possible for them to enforce what may be unpopular federal rights raised, often enough, by unpopular litigants. Federal judges do not stand election as do many state judges. They hold their positions for life and enjoy constitutional protection against diminution of their salaries. They are, then, insulated by the constitutional scheme from the vicissitudes of politics and public opinion. They can and do insist that government respect fundamental rights in a way that no other institution or court can.

The institutional setting in which the federal courts entertain federal constitutional claims arising in state criminal prosecutions also enhances their ability to adjudicate those claims properly and to reach accurate results. State courts are charged to enforce state substantive law and to comply with state procedural rules for the processing of cases as well as to appraise any federal defenses that defendants may raise. Apparently conflicting interests surface routinely, and federal rights are not always accorded their full scope. Federal courts, in contrast, examine federal claims in isolation from the pervasive focus in state court on the guilt or innocence of the accused. The values with which federal rights are associated are fully explored, and more informed and reliable judgments are produced.

The knowledge and experience of federal courts in the adjudication of federal claims also improves their capacity. State courts must master a range of substantive and procedural law and necessarily have less opportunity to nourish the special skills demanded in constitutional adjudication. The federal courts, on the other hand, owe their very existence to the federal standards they develop and apply.

Finally, the history of federal court responsibility for constitutional rights compells the Congress to retain the federal courts' role. The reordering of the relations between the states and the national government in the wake of the Civil War brought with it the most profound implications for the federal judiciary. The post-War constitutional amendments (particularly the fourteenth) and the flurry of legislative enactments (among them the Habeas Corpus Act) established the federal courts' primary role in the protection of federal rights against state power. That history can hardly be denied or overlooked even now, when some observers insist that the state courts have become more able and sensitive with respect to federal issues. If the state courts are improved, it is because the federal courts are where they are, where they have been for a century--waiting in the wings both to encourage the state courts to treat federal claims properly and to correct any errors state proceedings fail to cure.

S. 238 neglects all this. This bill promises to frustrate federal habeas corpus treatment of constitutional claims whatever may have happened in state court. If a litigant raised federal claims in state court and pursued them to judgment, this bill would have the federal courts defer to the state court decision even if it is wrong. If a litigant failed to raise such claims in state court, and thus avoided a state judgment to which the federal courts must defer, this bill would impose a forfeiture sanction in federal habeas--foreclosing treatment of any claim that was not, but might have been, pursued in state court. Finally, the bill would establish a one-year state of limitations which promises to cut off most federal claims that manage still to survive.

By way of illustration, consider a case in which a habeas applicant alleges that she is in custody in violation of the Constitution in that her conviction in state court rested upon a "confession" that had been coerced from her by the police. If S. 238 were the law, the federal court would be unable to grant relief even if it found the state court decision wrong--so long as the procedures in state court were adequate and the state court's judgment was not unreasonably wrong. We do not exaggerate here; the proponents of this bill mean to deny relief to American citizens even though a federal court decides that their constitutional rights have been violated.

Alternatively, consider the same case but assume that the petitioner's attorney in state court failed unaccountably to argue that the "confession" was involuntary and thus inadmissible under federal law. Except in certain narrow circumstances, S. 238 would not permit the federal court even to entertain the claim. Finally, consider the same case and assume that the petitioner was unable, because of poverty and ignorance, to marshal her consitutional claims in a petition for federal relief within a single year after the state supreme court rendered its incorrect judgment. In this instance, S. 238 would forestall federal adjudication because the litigant has somehow sat on her rights.

The Senate of the United States should have no part of a regime which would permit citizens to be treated in this unfair manner. Federal habeas corpus has not, to be sure, been without its critics. Over the years, many bills designed to undercut the postconviction writ have been introduced in the Congress. The Nixon Administration bill in 1973 is, perhaps, the best example. S. 567, 93rd Cong., 1st Sess. Some of the bills have come burdened with serious constitutional questions. Cf. Sanders v. United States, 373 U.S. 1, 11-12 (1963). Others have simply been found unwise. At all events, in virtually every case proposals to curtail the availability of federal habeas have been turned back. The few amendments that have been adopted have, in large measure, tracked already-existing Supreme Court decisions. S. 238 should suffer the same fate. This bill, like similar bills in the past, assumes without adequate evidence that the very existence of the habeas jurisdiction threatens important state prerogatives. That simply is not true. As the discussion which follows demonstrates, present statutes take due account of legitimate state interests, striking the proper balance between state concerns on the one hand and federal rights on the other.

We understand that this bill is also designed to streamline the processings of federal habeas corpus petitions. Proponents hope to conserve the time and effort of the lower federal courts. Arguments along these lines proceed from a faulty premise--that the processing of habeas petitions is now somehow inefficient. The fact is that these cases cause no more difficulty for the federal courts than any others. Given the number of habeas actions disposed of summarily, and thus without the expenditure of substantial resources, the federal courts are doing comparatively well. Recent reports from the Administrative Office indicate that the volume of habeas litigation is declining. Indeed, it is plummeting.

Only eight years ago, the Supreme Court promulgated and the Congress approved a special set of procedural rules for habeas matters. Much time and effort were expended on the fashioning of those rules, and we have seen no evidence that they are not having the very effect for which they were intended. We will point out below that the proposals buried in S. 238 are little more than warmed-over ideas the Congress has rejected in the past. To that extent, this bill arrives late in the day. At the same time, given that the federal courts have only recently begun to use the new habeas rules and their effect may not yet be fully known, the bill also comes too soon. Even if inefficiency were a current problem, and we do not agree that it is, this bill would do nothing to mitigate difficulties and much to exacerbate them.

II. Section-by-Section Analysis

The Proposal to Bar Habeas Relief if a Claim Was Fully and Fairly Adjudicated in State Proceedings

Section 5 of the bill would add a new subsection to section 2254 of the Judicial Code, barring federal habeas relief to prisoners attacking state judgments if their claims were fully and fairly litigated in state court. The proposal strikes at the core of the federal postconviction writ. If enacted, it would write an end to the principle, established in Brown, that prisoners are entitled to at least one opportunity to litigate their federal claims against criminal convictions iun a federal forum. We cannot estimate for you the enormous impact a withdrawal from that proposition would have upon the enforcement of the United State Constitution as it applies to state criminal prosecutions. Suffice it to say the effect would be dramatic.

Make no mistake. While this proposal is buried in a proffered amendment to section 2254, which now addresses only the timing of federal habeas review, the intent and impact of the proposal is the elimination of habeas review at any point. For thirty years it has been clear that the Supreme Court cannot reasonably be expected to correct mistakes of federal law on direct review from defendants' convictions in state court. The Justices are physically able to treat only a small number of carefully-selected cases--which, in turn, serve as vehicles for addressing problems of widespread, national concern. The Court simply cannot carry the burden of correcting mistakes in cases that are important only to the litigants. If federal review of federal claims is to be had at all, it must be in the lower federal courts sitting in habeas and acting, as it were, as surrogates for the Supreme Court. There is nothing new in this, nothing startling.

This bill would turn back the clock to the time when the federal forum was not available for the protection of federal rights, when criminal defendants were entirely at the mercy of state courts. Those days were not so long ago that we have forgotten the practices in which the state courts engaged and from which defendants were rescued only through the availability of federal postconviction review. It will be said that the state courts are better now, that they are more sensitive to federal claims than they were previously, and that they now can be trusted to make legal judgments without the protection of federal review, direct or collateral, in the background. We have seen no evidence of such changes.

To be sure, habeas relief is awarded in only a small percentage of cases. But we would ask the Committee to examine some of the cases in which relief has been granted--and recently. Just the other day, the Court of Appeals for the Eight Circuit awarded relief to a Missouri prisoner who has been convicted by a jury, hand-picked by the sheriff who had directed the investigation which led to his arrest. Henson v. Wyrick, 634 F.2d 1080 (8th Cir. 1980). More recently out in Ohio, the Sixth Circuit Court of Appeals awarded relief upon a prison's showing that a state trial court had refused to grant a continuance so that the defendant's chosen attorney could appear and then had given an appointed lawyer only ten days in which to prepare for trial in a serious case. Linton v. Perini, 656 F.2d 207 (6th Cir. 1981).

So long as cases like Henson and Linton pass through the state courts, so long as relief is awarded only by federal courts sitting in habeas after the state courts have refused to correct their own obvious mistakes, we cannot be persuaded that all is well in the state forum and that the protection of federal rights can safely be left there. The solid back-up of federal habeas corpus remains essential, both to encourage state courts to decide federal issues properly in the first instance and to correct their refusal to do so in appropriate cases.

The bill does, to be sure, limit the deference owed to state court judgments to cases in which claims were "fully and fairly adjudicated in State proceedings." On its face, this language seems to restrict the federal habeas courts to an appraisal of the procedures employed by the state courts in coming to their substantive decision on the merits. The Committee's report in 1983 explains that this, indeed, is at least part of what S. 238 intends. Yet there is a wide gulf between the authority to appraise the procedural aspects of state court litigation (as proposed by this bill) and the power to re-examine substantive results (as contemplated by present law). The one will not substitute for the other.

At the same time, the report indicates that various other ideas are meant to be smuggled into the meaning of "full and fair" state court litigation, notwithstanding that they are not explicitly stated in the text of S. 238. This, of course, promises no end of difficulty. The language actually proposed addresses what in common understanding can only mean procedural considerations. And the Committee can anticipate that courts would read it that way even if background materials suggest something else. That is not all. The drafters of this bill evidently mean not only to use language which is ordinarily associated only with procedure, and which is used in that fashion under present law, but to use that language in an entirely new way--to mean something it has never meant before. This is sloppy work; if it becomes law, the courts will waste valuable time and effort trying to make sense of it.

Apparently to meet the argument that the federal courts should not bow to unsound state court judgments, it is proposed that federal claims were not "fully and fairly" adjudicated in state court if the state court judgment on the merits, the product of state court process, is not "reasonable." S. 238 would thus write into the federal statute books one of the oldest of American jokes--"close enough for government work." That joke, moreover, would be played on citizens whose fundamental federal constitutional rights have been, by hypothesis, violated in state proceedings.

The joke would also be on the federal courts. They would be required, as always, first to reach their own judgment regarding the merits of a litigant's federal claim. How else to reach the further question whether a previous state court decision is close enough to bar federal relief? Then, of course, the federal courts would have to decide how close is close enough--presumably on a case-by-case basis. In time, the federal courts would have to develop a shadow set of standards, running roughly parallel to forthright interpretations of the Constitution but representing, instead, judgments that are wrong--but not so wrong as to be unreasonably wrong.

As this scheme is unraveled, the truth becomes rather clear. This bill is not intended either to ensure that federal rights are respected or to streamline federal habeas litigation. It does neither. This bill means to identify citizens who have meritorious claims and to deny them relief nonetheless--whatever federal adjudicative resources must be expended in the process. If enacted, S. 238 would amount to a cruel hoax on litigants with federal claims, the federal courts, and the American people.

2. The Proposal to Defer to State Procedural Grounds

Section 2 of the bill would transform § 2244, which now speaks only to the finality of federal habeas judgments, into a general barrier to the treatment of federal claims that were not considered in state court because of procedural default. While forfeitures for procedural default in state court are contemplated by present law, the regime which would be ushered in by S. 238 is vastly more rigid.

The current framework for handling abortive state proceedings can best be understood by proceeding seriatim through the questions the analysis contemplates. The initial issues are necessarily questions of state law. First, there must be a state procedural rule demanding that criminal defendants raise federal claims in some fixed manner and the state law sanction for failure to comply with that rule must be forfeiture of further state process for adjudicating the claim concerned. When the very existence of a state procedural default/forfeiture rule is in doubt, it is often posssible to defer to the judgment of the state courts, which are, of course, authoritative respecting matters of local law.

If it is established that there is a state procedural default rule with an attendant forfeiture sanction, the next question is whether the applicant's action or inaction constituted noncompliance. This, too, is a question of state law, usually answered in the course of exhaustion. If it is established that there is a procedural default/forfeiture rule and that what the applicant did, or failed to do, at trial constituted noncompliance with that rule, thus making the forfeiture sanction available, the next question, still one of state law, or perhaps best described as a question of fact, is whether that sanction was actually invoked.

If, and only if, all three preliminary, state law issues are negotiated, and the federal habeas court settles upon a case as one in which the applicant actually forfeited further opportunities for state court litigation because of procedural default, the analysis moves to a further question, which is decidedly federal--whether the state's procedural ground of decision will foreclose habeas treatment of the underlying federal claim. The answer is by no means automatic. If a state ground is found inadequate, the matter ends then and there--and the door to habeas review is thrown open.

It is plain that a state procedural ground can be at once a valid basis in state law upon which to rest the state court's judgment and an inadequate basis in federal law to cut off federal consideration of underlying federal claims. The relevant cases here are not, necessarily, those holding state procedures unconstitutional, but those, arising for the most part on direct review in the Supreme Court, holding state procedural grounds inadequate to frustrate federal review. Put simply, a state may have and apply a procedural policy and on that basis validly decline to pass on the merits of federal claims. Yet what is sufficient to foreclose state review may not, and often is not, adequate to bar federal review as well. The sufficiency of a state's basis for refusing to treat a federal claim is a fact-bound question which demands meticulous consideration on the peculiar facts of every case. The analysis, well-settled in the Supreme Court's direct review cases, is essentially a balancing of the legitimate state interests said to be furthered by the procedural rule in issue against the federal interest in the treatment of federal claims.

Finally, if the court determines all the preliminary, state law questions against the prisoner, and if the state procedural ground is found to be adequate under settled standards for that determination, the court turns to the further question whether to adjudicate the federal claim that the state courts, for their own reasons, refused to consider. At this point, current law distinguishes between defaults touching matters ordinarily left to the judgment of the defendant personally, and occurring at a stage of state proceedings at which there is time for reflection, from defaults regarding matters typically given over to defense counsel and occurring during the heat of trial. As to the first category of defaults, federal habeas courts reach the merits of underlying federal claims unless the default in state court constituted a "deliberate bypass" of state process. This is the rule of Fay v.

Noia, 372 U.S. 391 (1963). As to the second category of defaults, federal adjudication is open if the applicant demonstrates "cause" for the default and "prejudice" flowing from the federal error that, because of the default, was not addressed in state court. This is the rule of Wainwright v. Sykes, 433 U.S. 72 (1977).

This bill would alter present law dramatically. First, with exceptions to be discussed below, the bill would establish a forfeiture of an applicant's opportunity to litigate in the federal forum if the applicant failed to "raise a claim in state proceedings at the time or in the manner required by state rules of procedure. . . ." This constitutes a critical departure from present law. While Noia and Sykes, too, are triggered initially by procedural default under state law, those decisions forestall federal adjudication only if the state courts actually applied a state forfeiture rule as the sanction for the applicant's failure to comply with state law. This bill overlooks the real possibility that the state courts may forgive procedural defaults and reach the merits of underlying federal claims notwithstanding. Encouraged by the Supreme Court to cut through procedural snarls and to treat the merits of federal claims whenever possible, the state courts now rountinely consider the merits of such claims even when, as a matter of state law, it is open to dismiss them because of the petitioner's procedural default. When that occurs under present law, federal habeas corpus review is not precluded. County Court of Ulster County v. Allen, 442 U.S. 140 (1979). This bill would have the federal courts do precisely what the Supreme Court in Allen refused to direct--that they accord more respect to state procedural rules than do the state courts themselves.

Second, and again in contrast to present law, the bill would not require the federal courts first to determine that state procedural grounds are independent and adequate to foreclose federal review. In the Sykes case, Justice Rehnquist explicitly revived the adequate state ground rule for use in habeas cases. The Sykes framework contemplates an intermediate analytical step between the necessary determinations of state procedural law and the further questions whether "cause" and "prejudice" can be demonstrated. Even if the applicant committed procedural default under state law, and even if the state courts for that reason declined to consider the underlying federal claim, still habeas corpus review is not precluded under Sykes if the federal court determines that the state procedural ground is an insufficient basis upon which to rest the judgment. S. 238 means to eliminate this intermediate step. If enacted in this form, the bill would drastically restrict the flexibility the Supreme Court has found appropriate in examining state procedural grounds of decision.

Third, the bill would discard the "deliberate bypass" standard established in Noia and would force the federal courts to apply the Sykes "cause" and "prejudice" standards, as redefined by further subsections, to all cases in which the state courts refused to consider federal claims because of procedural default--of any kind, with respect to any issue, and at any stage of state proceedings. This is to ignore the many good and principled reasons for treating one category of defaults differently from the other. It is one thing to hold prisoners to defaults committed, usually by counsel, in the give and take of trial when there was little time for consultation and when the state's interest in immediate treatment of federal claims (before violations of federal rights occurred) was at its height. The comparatively stringent "cause" and "prejudice" standards in Sykes were established with this kind of default in mind. It is quite another to deny litigants access to the federal courts when counsel's default related to issues that did not call for expert judgment but the personal choice of the client and when default occurred at a stage of state proceedings at which there was time for consultation and reflection and the state's interest in immediate litigation of the federal claim was diminished. The departure from Noia contemplated by S. 238 is explained only as an attempt to resolve unspecified uncertainties in current law. This will not do. To jettison the "deliberate bypass" rule is to neglect the very real differences between the situations that Noia and Sykes were designed to address. See Sykes, 433 U.S. at 92-93 (Burger, C.J. concurring).

Fourth, focusing on the Sykes framework, S. 238 would permit federal habeas review if the applicant suffered "actual prejudice" and one of three circumstances is presented: the failure to raise the claim properly in state court was the result of state action in violation of federal law; the federal claim was not recognized prior to the default; or the factual predicate for the claim could not have been discovered by the exercise of reasonable diligence prior to the default. In this, the bill attempts legislatively to define "cause" for procedural default within the meaning of Sykes. The attempt must be found wanting. Certainly if any of these circumstances is shown, then "cause" should be found and the federal habeas forum should be open--even if the state courts, for their own inscrutable reasons, refused to reach the merits. Yet these exceptions can scarcely be the end of the matter. There are other circumstances which justify a finding of "cause".

The Committee must understand the evil with which the Court was concerned in Sykes and against which the "cause" standard was designed to protect. The problem addressed in Sykes was "sandbagging," defined by the Court as the practice of withholding federal claims in state court, thus committing procedural default, in the hope of obtaining a favorable verdict--but with the intention of raising those same federal claims later if the "gamble" does not "pay off." The tactic is intentionally to build constitutional error into a criminal prosecution, to hope that the client will be acquitted anyway, but then to be prepared to raise the federal claim later in habeas corpus if the client should instead be convicted.

There is a rich literature on the relationship between defense counsel's tactical maneuvers in state court and the requirements of state procedural law, and, in turn, between forfeitures of state remedies brought about by such tactics and the continuing availability of federal habeas corpus. Suffice it to say here that the Court in Sykes had those questions very much in mind and established the "cause" test in order to screen from the federal forum cases in which counsel's strategic maneuvering in state court results in procedural default and consequent forfeiture of state process. The Court was not concerned with default which is the result of counsel's ignorance, negligence, or sloth. There was no attempt in Sykes to cause prisoners to forfeit federal habeas review simply because of counsel's incompetence, whether or not that incompetence rises to the level of ineffective assistance of counsel in the sixth amendment sense. The evil of "sandbagging" does not lie in defense counsel error, in negligence or ignorance, but in deliberate trial tactics the Court will permit the state courts to punish with a forfeiture sanction--in order to protect their opportunity to adjudicate federal claims before federal habeas jurisdiction is invoked. Certainly if the root idea is to create incentives to comply with state rules governing the orderly processing of criminal cases, it makes sense to confine the "cause" analysis to cases in which counsel was aware of the need to conform and the consequences of procedural default.

The definition of "cause" proposed in S. 238 is much narrower and is plainly calculated to hold state prisoners responsible for the mistakes of defense counsel--over whom they have no control. The Supreme Court has proposed no such harsh treatment of federal claimants. Nor should the Congress through an unfortunate misunderstanding of the Sykes decision. In the wake of Sykes, the lower federal courts are even now filling out a fair and equitable framework for examining the question of "cause." That framework blends structure with necessary flexibility. It promises to work and to work well, striking the proper balance between state and federal interests. This bill's misguided attempt to hammer the "cause" notion into statutory form should be identified for what it is and rejected.

3. The Proposal to Establish Procedural Default Standards in 2255 Cases

Section 6 of S. 238 would import into cases arising under § 2255 of the Judicial Code, in which movants challenge federal convictions and sentences, the procedural default strictures proposed for habeas corpus by section 2 of the bill. This proposal, too, is misguided.

When, in Sykes, the Supreme Court developed stringent standards for appraising the effect of certain kinds of procedural default in state court, the primary concern was comity. Justice Rehnquist placed great emphasis upon the desirability of avoiding needless friction between the federal and state courts and, to that end, offered the Court's guidelines for giving effect, in some instances, to independent and adequate state procedural grounds of decision. Comity, of course, plays no role in proceedings pursuant to § 2255. By definition, these cases have only to do with challenges to federal, not state, action. Accordingly, a good portion of the reasoning in Sykes is inapposite in this context. To the extent Sykes' provision for forfeitures was a response to concerns for state prerogatives, it must reasonably be left to operate only in that sphere and cannot be lifted up and deposited in 2255 cases--where the same concerns simply do not exist.

We acknowledge that the finality of judgments, too, formed a part of the justification for Sykes and that Court has relied upon the Sykes standards in the 2255 context. United States v. Frady, 456 U.S. 152 (1982). We do not understand, however, that the Court has yet grappled fully with the implications of resting the Sykes framework solely on the interest in finality. And we certainly see no warrant for congressional action to that end.

The Court has addressed the comparatively narrow interest in the finality of federal judgments in other ways. In order to encourage the use of ordinary trial and appellate opportunities for the litigation of claims, the Court said in Kaufman v. United States, 394 U.S. 217, 227-78 n. 8 (1969), that if a federal trial or appellate court has "determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a 2255 hearing." Furthermore, the 2255 court's discretion has developed in practice into a general rule that, absent "manifest in justice" or special circumstances such as a change in the law, 2255 motions will be dismissed summarily if they raise claims that were or might have been asserted on direct review. In light of Kaufman, the framework proposed in S. 238 is not only unwise, but unnecessary.

Once again, the bill under examination constitutes overkill. First, it proposes to fasten upon the federal habeas courts a harsh, unfair, and unworkable system of forfeitures in cases in which procedural default occurred in state court. In this, the bill would displace an already severe set of standards, established by the Court in Sykes. Now, without explanation, the bill proposes to mix apples and oranges, to treat 2255 proceedings (involving only attacks upon federal convictions and sentences) as though they were the same as habeas corpus cases (where comity is of vital importance) and, accordingly, to apply similar, and similarly harsh, rules to both.

4. The Proposal to Defer to Factual Findings

Section 5 of the bill would also amend what is now section 2254(d). That subsection currently governs the effect to be given certain state court findings of primary fact in federal evidentiary hearings. It may seem on first blush that the bill wishes only to discard the vague and ambiguous language of the present statute and to replace it with comparatively clear and straightforward guidelines. If that were all, we would raise no objection. For it is as plain to us as it is to others that section 2254(d) is not happily drafted. The truth is, however, that the bill does propose substantive changes. They must be taken in turn.

First, present law extends a presumption of correctness to state findings only if: (1) they were made after a hearing; (2) the hearing reached the merits of the factual issue; (3) the state court was of competent jurisdiction; (4) the applicant was a party to the proceeding; and (5) the determinations are "evidenced by a written finding, written opinion, or other reliable and adequate written indicia. . . ." This bill is by no means so demanding. It extends a presumption of correctness to any "full and fair determination of a factual issue made in the case by a State court. . . ."

By omitting key requirements in present law, the Congress would signal the federal courts that they no longer need demand such important safeguards as actual hearings in state court and written findings. In that event, it is possible that findings unsupported by adequate evidence in a hearing might be proffered to the federal courts by state authorities who can only testify to them orally. Even if one is committed to the proposition that some state findings of primary fact may safely be accepted by the federal habeas courts, the safeguards set forth in the present statute are critical. Only reliably-found facts can be permitted to form the basis for judgment on federal issues. This bill's loose language provides no guarantee on that score, and, instead, promises to import needless risk into habeas proceedings.

Second, present law sets forth a check list of eight subsections, which must be reviewed by the federal habeas courts in making the decision whether state determinations of primary fact are to be accorded a presumption of correctness. If state findings fail any of the eight tests, then the presumption falls away. These standards are borrowed from, and overlap with, similar standards set forth in Townsend v. Sain, 373 U.S. 293 (1963), to guide the courts in making the decision whether to hold a federal evidentiary hearing in the first instance.

This bill would sweep all that away. The only guidance this proposal offers is the vague statement that state determinations must have been "full and fair." The Congress would take enormous risks in this field if it were to eliminate relatively specific guidelines that have stood the test of litigation in the courts--in favor of vague and ambiguous language that would inevitably be subject to interpretation.

Third, present law requires the respondent to present "due proof" of factual determinations and then, if all eight standards are satisfied, places the burden on the petitioner to establish by "convincing" evidence that the state determination is erroneous. This bill, in contrast, says nothing about the burden of proving state findings in the first instance and refashions the applicant's burden as one of rebutting the presumption by "clear and convincing" evidence.

5. The Proposal to Establish a One-Year Statute of Limitations

In a further proposed amendment to section 2244, S. 238 would establish a one-year statute of limitations for postconviction habeas applications. This is, perhaps, the plainest evidence that the proponents of S. 238 do not understand and appreciate the present system of habeas corpus review. Everyone who has studied these problems recognizes that stale claims create difficulties for all parties to litigation. Reasonable and just devices for encouraging the earliest practicable pursuit of federal relief are, accordingly, entirely proper. The federal courts have always taken into account any unreasonable delay in the filing of habeas petitions, and a great many petitioners have been denied relief precisely because their inexcusable delay prejudiced the ability of the respondent to defend.

Under existing habeas corpus rules, petitions may be dismissed "if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of due diligence before the circumstances prejudicial to the state occurred." § 2254 Rule 9(a). The federal courts have developed an effective framework for evaluating claims of undue delay and prejudice to the state--providing adequate protection against prisoners who deliberately withhold claims.

A rigid statute of limitations is wholly inappropriate in this field. It is in the nature of collateral claims that they come to the attention of prisoners or counsel well after the judgments subject to attack. The Supreme Court has recognized as much on many occasions. Few principles are better-settled than that federal habeas review is available "without limit of time." United States v. Smith, 331 U.S. 469, 475 (1947).

There are good reasons why a statute of limitations is inappropriate. First, the challenge in habeas is to detention simplicitur and not to a prisoner's conviction. A statute of limitations is, accordingly, theoretically unsound. Habeas applicants complain of their present treatment. Second, it is in the nature of collateral claims that they come to litigants' attention well after judgment. Time is required thereafter to define federal issues precisely, to marshall all available arguments, and to file a well-drafted petition. Moreover, habeas litigation is typically carried on by undereducated prison inmates proceeding pro se. They cannot be expected to act with the dispatch that might reasonably be demanded of professional advocates.

We recognize, of course, that S. 238 attempts, at least, to avoid conflict with the exhaustion doctrine, which requires habeas applicants to bring their federal claims in the state courts before bringing them in the federal forum. The bill recognizes that prisoners cannot control the pace of state court decisionmaking. The one-year time period runs, accordingly, from the time at which state remedies are exhausted. That precise time, however, may be difficult to pinpoint. The successful exhaustion of state remedies is a legal question not routinely answerable short of decision in federal court.

Hypotheticals can be constructed in which the application of a statute of limitations geared to the completion of exhaustion may lead to unfair results. What is the result, for example, when a prisoner, who satisfies the exhaustion doctrine by bringing a purely legal question to the state's highest court on direct review, mistakenly believes it necessary also to pursue state collateral relief thereafter and then spends sufficient time in state postconviction proceedings to arrive in federal court more than a year after the original appellate decision? Cutting back the other way, what is the result when a prisoner, who mistakenly believes that direct review has satisfied the exhaustion doctrine with respect to a fact-oriented claim, spends nearly a year preparing a federal petition, files for federal relief on the last possible day, and then learns that the exhaustion doctrine has not yet been met? If the prisoner returns to state court, will another limitation period begin to run when the highest state court denies relief on review of state collateral proceedings? If so, does it follow that prisoners in any case can generate an additional period whenever they like, simply by applying to the state courts for another rebuff? As long as they are careful never to permit more than a year to elapse between courts? The Justice Department's lawyers may have answers to these questions and others, but it will take litigation to make those answers stick.

Further subsections create, in the language of the commentary, certain "exceptions" to the "general rule" that the one-year period begins to run at the time state remedies are exhausted. These "exceptions" roughly parallel the circumstances, identified in other proposed amendments to § 2244, that justify a finding of "cause" for procedural default. Far greater clarity is demanded regarding the precise date on which an extraordinarily short limitations period begins to run. We can expect more confusion than we can afford, for example, in cases in which proposed § 2(e)(3) controls, and the federal habeas courts must ascertain the date on which a federal right was "initially recognized." Lawyers and judges have difficulty determining whether the Supreme Court has "recognized" a claim. Only rarely are the Court's precedents "on all fours" with the case at bar, admitting no basis for distinction. Greater exactitude is necessary if a statute of limitations is to be workable.

We recognize the difficulty that S. 238 faces. The ambiguity built into this bill stems largely from attempts to mitigate the severity of a statute triggered by, for example, the date of the criminal judgment under attack. That the drafters have been unsuccessful in writing a bill that can work and work fairly only underscores the futility of the attempt to introduce such a statute of limitations in the first instance. There is simply no need for, and much reason to resist, a rigid rule that cuts off federal claims without asking why they were not presented sooner or how the delay has added to the respondent's burdens. Indeed, it was to contend with the various interests at stake in habeas cases that the more flexible framework under Rule 9(a) was established.

6. The Proposal to Demand Certificates of Probable Cause in § 2255 Appeals

Section 3 of the bill would amend § 2253 of the Judicial Code, which governs appeals in habeas corpus. The bill proposes to require a certificate of probable cause as a necessary predicate to appeals in § 2255 cases. Under present law, only habeas corpus petitioners attacking state judgments must obtain a certificate before they are permitted to pursue an appeal to the appropriate circuit court. This bill would extend the requirement to 2255 movants--prisoners attacking federal convictions collaterally. Such a proposal was made in the Congress ten years ago. The Nixon Administration included such an amendment in its package of bills in 1973. See S. 567, 93rd Cong., 1st Sess. The Congress rejected the idea then and should reject it again now. The difficulty with the certification requirement is not that it applies only to habeas applicants and not to 2255 movants. It is that it applies to anyone.

Throughout their history, certificates of probable cause have been the source of confusion and needless complexity. It took years to determine, for example, whether prisoners must request, or actually obtain, a certificate within the thirty days provided for filing a notice of appeal, and whether, in all events, the issuance of a certificate must precede the filing of a notice. In addition, the standard for determining whether a certificate should issue has baffled the courts. Any supposed distinction, for example, between the standard for "frivolity" under § 1915 of the Code, and the standard for issuing a certificate of "probable cause" under § 2253 calls for artificial line-drawing that serves no identifiable interests on either side of habeas litigation.

All this confusion is unnecessary. The purpose of the certification requirement is to protect the appellate courts and respondents from nonmeritorious appeals. The root idea, then, is to conserve the resources of both by avoiding the expenditure of time and effort upon appeals that cannot be successful. Yet litigation over the question whether there is probable case for an appeal more than balances any conservation of energy when an occasional petitioner is discouraged from proceeding. The net effect of the requirement is more, not less, work for the federal courts. Rather than waste scarce resources in a misconceived effort to screen nonmeritorious appeals away at the threshold, and, certainly, rather than waste even more resources by extending the certification requirement to 2255 cases, the Congress should dispense with the idea altogether.

7. The Proposal to Eliminate the District Judges' Authority to Issue Certificates of Probable Cause

Section 3 of the bill would not only extend the certification requirement to 2255 cases, but it would apparently eliminate the authority of district judges to issue certificates of probable cause. The effort to place all power to permit appellate review in collateral attack cases with circuit judges must be found wanting. Such a change would only exacerbate present difficulties with the certification requirement, throwing up still another obstacle to the fair and just treatment of federal claims. If any judge can make a reliable determination regarding the arguable merit of an appeal, it is probably the judge who considered the claim at the trial level--even if relief was denied. We would not wish to make a district judge's judgment final by any means. Decisions to deny certificates are and should be subject to de novo consideration at the circuit level. But we see nothing to be gained and much to be lost by denying to district judges the authority to make determinations in any case. Under present law, district judges who determine that appeals warrant attention can issue certificates and guarantee appellate review. Nowakowski v. Maroney, 386 U.S. 542 (1967). That is as it should be. For, again, district judges are in an excellent position to identify arguable claims.

The answer is the elimination of the certification requirement in all cases. Then federal judges can spend their valuable time where it counts--on the merits of the cases before them. It is common truism, albeit often neglected, that the most efficient course is not the use of contrivances to avoid decision, but the prompt treatment of the merits--once and for all.

8. The Proposal to Permit the Denial of Habeas Corpus Relief Even Though the Applicant Has Failed to Exhaust State Remedies

Section 5 of the bill would amend § 2254(b) to permit petitioners' federal claims to be denied on the merits, notwithstanding the failure to exhaust state remedies. In theory, the proposal would not change present law. The exhaustion doctrine is not now, and never has been, a jurisdictional prerequisite to treatment of claims on the merits. The doctrine responds to legitimate concerns for comity. In appropriate cases under present law, the federal habeas courts have power to dispense with exhaustion. In practical fact, however, the federal courts do insist that state remedies be exhausted, and it is the rare case in which the doctrine is not invoked. So long as the federal courts are constrained to demand exhaustion before awarding habeas relief, even when the applicant is clearly entitled, we doubt the wisdom of lowering the exhaustion barrier in cases in which relief is due to be denied.

The proper course in cases in which state remedies have not been exhausted is dismissal without prejudice to further habeas proceedings after relief has been sought in state court. Slayton v. Smith, 404 U.S. 53 (1971). It is often impossible to hold with confidence that no set of facts can be established that would justify the award of relief--before the state courts have examined the claim and perhaps held hearings to develop the record. If relief is denied summarily by the federal district court, the petitioner will be denied the opportunity to seek a remedy in state court at all. While in theory a state remedy might be available, as a practical matter it is unlikely that the state courts would entertain a claim already rejected in federal habeas. All told, the present scheme is clearly the most appropriate. This proposal, too, should be set to one side.

III. Conclusion

It is not uncommon that political positions harden in the ideological make-up of those who embrace them. They may, then, take on a life of their own. Years ago, the jurisdiction of the lower federal courts to examine federal constitutional claims in habeas corpus was very much a "hot" political question. Articles and reports were written, arguments were made, and positions, most importantly, were taken. After the debate, in the Congress and elsewhere, the result was plain. Habeas corpus was recognized as a desirable and effective part of the structure of American justice.

Some state interests were, to be sure, subordinated to the greater national interest in the enforcement of federal rights. Yet, in the main, ways were found to acknowledge and respect the most important state concerns so as to avoid unnecessary friction. Amendments to the habeas corpus statutes in 1948 and in 1966, together with a string of Supreme Court decisions, have ameliorated considerably any remaining difficulties. Now, the new habeas corpus rules promise to improve efficiency. The habeas caseload which genuinely concerned some observers decades ago has tapered off and is now declining. In a healthy and welcome spirit of cooperation, the state and federal courts have established a consistent and effective framework of review, which no longer produces the hostilities generated by habeas when it was first introduced.

In this atmosphere, new legislation would be unnecessary and disruptive. S. 238, like so many others bills in the past, is rooted in an ideological resistance to habeas that has simply outlived the circumstances which gave rise to it. Those who advocate action on this bill must carry the burden of demonstrating that their proposals speak to real and significant problems today. We hope that what we have said here helps to explain why that burden cannot be sustained.

Supplemental Statement of Larry W. Yackle
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In the wake of hearings on S. 238 on October 8, 1985, Senator Biden and Senator Leahy sent written questions regarding the bill to the Department of Justice. We understand that the Justice Department's responses, dated November 20, 1985, will become a part of the record before the Committee. Accordingly, we take this opportunity to register our appraisal of those responses.

BIDEN QUESTIONS

A.

Senator Biden asked whether the language of the Habeas Corpus Act of 1867, which expressly granted the lower federal courts power to issue the writ on behalf of "any person...restrained of his or her liberty in violation of [federal law]," supports the conventional understanding that the federal courts have authority to relitigate federal issues arising in state criminal prosecutions. The Justice Department's answer, provided by Mr. Brady, refers to a single law review article, published two decades ago, in which Professor Mayers argued that the drafters of the Act intended only to protect former slaves from harsh apprenticeships and labor contracts. This response is deeply flawed--on at least three levels.

To begin, Mr. Brady implicitly concedes the very point he apparently wishes to rebut. Presented with statutory language that squarely confers the jurisdiction the Justice Department disapproves, he shifts ground to Professor Mayers' reading of historical materials apart from the statute. In this, he evidently acknowledges that the statutory language does indicate broad judicial power in habeas, but hopes to persuade us that the real meaning of the Act is to be found somewhere else. Indeed, he argues that the express language of the statute is negated by other materials that, in his view, prove that the drafters did not mean what they said. We suggest that the search for statutory meaning in this instance, as in any other, should begin with the text itself. That is where the Supreme Court began when it first construed the 1867 Act:

> The grant to the Circuit Courts in [the 1867 Act] of jurisdiction to issue writs of habeas corpus, is in language as broad as could well be employed....Whether, therefore, the appellant is a prisoner in jail...or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the Circuit Court has, by the express words of the statute, jurisdiction on habeas corpus to inquire into the cause for which he is restrained of his liberty, and to dispose of him 'as law and justice require.' Ex parte Royall, 117 U.S. 241, 247 (1886).

Even if we indulge Mr. Brady's retreat from the language of the statute and seek the meaning of the 1867 Act in its legislative history, the citation to Professor Mayers' article is, at best, misleading. Every other academician who has examined the evidence and published his or her conclusions has taken the position that the purpose of the Act was to establish federal enforcement machinery for Reconstruction legislation and constitutional amendments, namely the fourteenth amendment. This was the view taken by Professor Warren, our most respected legal historian. 2 C. Warren, The Supreme Court in United States History 465 (rev. ed. 1953). It was also Alexander Holtzoff's position (offered, by the way, when *he* was in the Justice Department):

> The Act of 1867 consitutes a landmark in the development of habeas corpus procedure....By virtue of this statute the prisoner may have a searching judicial inquiry into the truth and substance of the causes of his detention, even though it may become necessary to look behind and beyond the record for that purpose. Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U. L. Rev. 26, 31-32 (1945).

Others have offered similar views. E.g., Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 839 n. 191 (1965); Collings, *Habeas Corpus for Conficts--Constitutional Right or Legislative Grace?* 40 Calif. L. Rev. 335, 351 (1952); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1325 (1961). And, of course, the Supreme Court has accepted their conclusions. *Fay v. Noia*, 372 U.S. 391, 415 (1963). Even Professor Bator, upon whom the Justice Department heavily relies regarding other aspects of habeas, has said that, "surely the underlying concern was the enforcement of the reconstruction legislation." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 n. 80 (1963). In the end, Mr. Brady's position rests on a single commentator, whose views are inconsistent with the body of scholarship in the field. See generally S. Kutler, Judicial Power and Reconstruction Politics (1968); Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 Am. J. Legal Hist. 333 (1969).

Finally, there is good reason for Professor Mayers' isolation. He is flatly wrong in his assessment of the historical materials. Those materials are, in Professor Bator's words, "strikingly sparce." Bator, *supra* at 475. Sifting through them, Mayers seizes upon indications that some drafters of the relevant bill may have been charged to propose legislation to deal with egregious labor arrangements involving former slaves. Whatever the value of those documents (and Professory Mayers' conclusions based upon them), there is far more probative evidence regarding the contemporaneous purpose of the bill. The Chairman of the Senate Judiciary Committee, Senator Trumbull of Illinois, expressly explained the bill to his colleagues when he reported it for action on the floor:

> [T]he habeas corpus act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of habeas corpus to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States. Cong. Globe, 39th Cong., 1st Sess. 4229 (1866).

Professor Mayers acknowledges this speech, but insists that Trumbull misunderstood what the bill's drafters were actually attempting to do. Yet even if Mayers is correct (and, again, we do not agree that he is), the hard fact of the matter is that the bill was passed in the Senate on the basis of the explanation offered by Trumbull. If any "original intention" based on materials apart from the statute itself is relevant to a modern construction of the Act (and, of course, we do not agree that any is), it surely must be that of the members of Congress who voted on the bill--whatever the views of those who drafted it. There being no reason to suppose that rank and file senators were aware of a different meaning for the bill (different from the meaning the Chairman of the drafting committee gave it on the floor) and somehow enacted *that* meaning into law (in language that flatly contradicted it), the only fair conclusion to be drawn is self-evident. The Senate adopted the 1867 Act for the purpose identified by Trumbull and clearly stated on its face.

Second, the Senator asked whether it is not significant that Congress has never amended the 1867 Act to limit federal habeas jurisdiction to the obscure cases that Professor Mayers mentions. Mr. Brady answers that the "fact" of Congress' long-standing acquiescence in the conventional understanding of the 1867 Act is of "no significance," because, in his view, Congress has "played virtually no role in creating the existing federal habeas corpus jurisdiction." This is an odd position to take, particularly in light of Mr. Brady's insistence that the federal courts' jurisdiction in habeas has little constitutional basis and depends primarily upon the 1867 Act--product of Congress. It may be that Mr. Brady has in mind not habeas jurisdiction itself, but the Supreme Court's body of case law in the field. Yet, here again, he is mistaken. He insists that when Congress has acted in recent years, the new legislation has "invariably" restricted the availability of the writ. On the contrary, most of the habeas legislation in the modern period has tracked Supreme Court decisions, demonstrating Congress' endorsement of the Court's work. See generally L. Yackle, Postconviction Remedies § 19 (1981) (Supp. 1985) (reviewing not only recent amendments but unsuccessful attempts to undercut habeas legislatively). The most important legislation, enacted in 1966 and now found in § 2554(a) of the Code, explicitly reaffirms Congress' intention that the federal courts have broad power in habeas:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Mr. Brady's attempt to ascribe responsibility for postconviction habeas corpus entirely to the Supreme Court founders badly on this statute--which squarely contemplates that prisoners held under the authority of a state court judgment can pursue federal habeas relief.

Then, too, it was only in 1976 that the Congress approved two sets of rules to govern habeas and § 2255 cases. With respect to the rules, Mr. Brady again has difficulty of his own making. He cites Rule 9(a) as an illustration of Congress' attempt to restrict the availability of habeas to tardy claims, but he neglects to mention that the original draft of that rule, promulgated by the Judicial Conference and approved by the Supreme Court, was much harsher--proposing a presumption against entertaining a petition submitted five years after the judgment under attack. It was Congress, not the Court, which eliminated any such presumption from the rule before it became law. *See* L. Yackle, *supra* §§ 114, 154 (describing Congress' changes in Rule 9(a) and Rule 9(b)--also amended favorably to would-be petitioners); Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 Iowa L. Rev. 15 (1977) (detailing the legislative treatment of the rules). It simply is not the case that either Congress' acquiescence in Supreme Court decisions or its relatively few recent enactments are without significance. The development of federal habeas into an effective mechanism for the enforcement of federal law has been a joint effort for more than a century.

Senator Biden asked, third, whether the federal courts' authority to determine federal questions arising in state cases was not established long before the 1960's, when the Justice Department's prior statement suggests habeas became a general postconviction remedy. Specifically, the Senator cited *Moore v. Dempsey*, 261 U.S. 86 (1923). Mr. Brady insists that Moore was another kind of case entirely and, following Professor Bator, that

Brown v. Allen in 1953 constituted a "definitive break" with what had gone before. Once again, Mr. Brady's selective citation of authorities leaves the wrong impression.

We acknowledge that the scope of federal habeas has developed over the years--and properly so. Our resistance to S. 238 does not depend in any way upon the outcome of the scholarly debate over what change may have occurred in what case at what time. It is worth pointing out, however, that there is such a debate and that Professor Bator has not won it. See, e.g., Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. Civ. Rts.--Civ. Lib. L. Rev. 579 (1982) (mounting a powerful attack on Bator's reading of the relevant cases--including Moore). And, at all events, any latent suggestion that modern habeas is the product of the Warren Court is simply without foundation.

There is reason for the academic debate regarding the development of habeas. It is often unclear whether, in cases like Moore, the Court's language was addressed to the availability of habeas generally, to the timing of habeas litigation, or to the substantive meaning of the due process clause of the fourteenth amendment (also developing in the period). Mr. Brady's statement of Moore is a fitting illustration. The truth is, he badly misstates the case; the very language he quotes in support of his understanding of Moore refutes his position. Mr. Brady has it that Moore embraced the view of due process the Court had taken eight years earlier in Frank v. Mangum, 237 U.S. 309 (1915). Justice Pitney's opinion in Frank suggested that due process was satisfied in state court even if the trial was dominated by a mob--if the prisoner's claims regarding the trial were fully and fairly adjudicated at a further stage of state proceedings, namely appellate review within the state system. Justice Holmes filed a famous dissent in Frank. Then, writing for the majority in Moore, he largely "discredited" the earlier case--holding, contra Frank, that a federal habeas court could find a violation of due process in a mob-dominated trial notwithstanding a state appellate court's determination that no error occurred. Hart, The Supreme Court, 1958 Term--Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 105 (1959). This is the message in the portion of the Holmes opinion in Moore quoted by Mr. Brady. If the trial in a criminal case was dominated by passion "and...the State Courts failed to correct the wrong," then even "perfection in the [state] machinery for correction" is not "sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself...." At most, Moore suggested that only particularly egregious due process violations were cognizable in habeas, and even that much hesitancy to adjudicate federal claims was abandoned in the years following--well before the Warren Court's decisions in 1963. See Hart, supra; Peller, supra.

B.

Senator Biden asked when it was that the state courts began to demonstrate the sensitivity to federal rights that the Justice Department insists they now have. Mr. Brady responds with a quotation from an article by former Attorney General Smith. The quotation cites no authority, but merely offers the opinion that the state courts are now more solicitous of federal claims than they once were. This misses the point of the Senator's question--which is that if the state courts are now better, it is probably because of the availability of federal habeas. No one seriously argues that the Supreme Court can act as a court of error, correcting state court mistakes of federal law as part of its routine business. The sheer number of cases makes reliance on appellate review infeasible. If, then, the state courts are to be policed at all within the present statutory scheme, it must be through collateral review in habeas. Mr. Brady's view, in the end, is that the state courts should be left to themselves, even regarding interpretations of the Constitution, without concern for the federal habeas courts waiting in the wings to ensure correct decision-making. This, again, is only an opinion. There are others.

The recent experience with the fourth amendment exclusionary rule is illuminating. Now that such claims are largely boxed out of habeas by the Court's decision in Stone v. Powell, 428 U.S. 465 (1976), the correction of fourth amendment errors has fallen to the Justices on direct review. Two things have happened, both of them to be expected. On the one hand, the Court has responded by accepting an extraordinary number of fourth amendment cases for review--nine in the Term in which Stone was decided--and thus devoted a disproportionate share of its limited docket space to cases that, but for Stone, might have been resolved in the lower federal courts. See United States v. Martinez-Fuerte, 428 U.S. 543, 567-569 (1976) (Brennan, J., dissenting) (insisting that the cases were all decided incorrectly--against the individual). On the other, the Court has apparently found it impossible to take enough cases and, certainly, to take them only to correct errors rather than to elaborate innovative doctrine. E.g., Trapper v. North Carolina, 451 U.S. 997 (1981) (Brennan J., dissenting from the denial of certiorari) (pointing out the problem). The result is that many fourth amendment errors are now going without remedy. Many state courts, relaxing in the knowledge that their judgments will not be reviewed in the federal forum, have apparently lapsed back into the neglect of fourth amendment claims that existed prior to the development of federal habeas as a backstop.

Senator Biden next asked whether fundamental constitutional principles have not been announced in Supreme Court and federal appellate court habeas opinions in the past thirty years. In response, Mr. Brady concedes the point. He acknowledges that habeas has been the vehicle for the articulation of constitutional doctrine, albeit the Court has also elaborated principles on direct review. Inasmuch as Mr. Brady offers no rebuttal here, we note only that Brady's final aside, to the effect that lower court determinations of federal law are not "binding" on state courts, presents ticklish jurisprudential problems. If Mr. Brady means that a federal court's judgment in favor of a habeas petitioner does not operate, in theory, to upset a contrary state court judgment, then he is certainly correct. If, however, he means to suggest that the state courts are free to ignore federal decisions, he is quite mistaken. State prisoners who continue to be incarcerated without curative action in the teeth of federal decisions that their convictions were invalid will, in the end, be released from state custody on an order from the federal bench. E.g., Harris v. Kuhlman, 601 F. Supp. 987, 994 (E.D.N.Y. 1985) (ordering a prisoner released if a long-delayed state appeal was not decided within sixty days).

Next, the Senator asked the Justice Department to name the ten most recent cases in which the federal habeas courts erroneously awarded relief. Mr. Brady offers a list of cases in which the Supreme Court reversed lower court judgments favorable to habeas petitioners. Yet those cases should be understood in a fair light. We acknowledge, of course, that the federal habeas courts occasionally make mistakes and that direct review of their judgments in the Supreme Court is essential. It hardly follows, however, that Supreme Court decisions upsetting such judgments are evidence that habeas is not working or, in some fashion, shown to be unnecessary. Once again, the Justices do not sit as a court of error. They take cases as vehicles for the articulation of substantive and procedural law--to send signals to the lower courts about the way in which legal issues should be handled. If, in the end, the Court's elaboration of doctrine leads to the reversal of a lower court judgment, that outcome is largely insignificant. For if the proper analysis had been clear from the outset, the Court probably would not have selected the case for treatment at all--even if the Justices thought that the lower court had reached the wrong result. Moreover, some of the cases cited by Mr. Brady involved technical questions of habeas practice. The lower court judgments that were reversed depended, then, upon constructions of the habeas rules and statutes that the Supreme Court, in some instances surprisingly, disapproved after the fact.

Senator Biden asked for comment on nine recent cases in which constitutional violations were identified in habeas. Mr. Brady avoids discussion of the six lower court decisions on the ground that habeas would have been available to the prisoners concerned even under the proposals in S. 238. Evidently, he means to suggest that the state court judgments found wanting in these instances were so unjustified as to be "unreasonable"--so that, under the Justice Department's understanding of S. 238, the federal courts could have concluded that the state court proceedings concerned were not "full and fair." We have previously addressed the intractable difficulties with both the proposal to cut off habeas when state process was "full and fair" and the Justice Department's curious definition of "full and fair" proceedings--offered in nonbinding comments accompanying this bill. Hearings on S. 238 Before the Comm. on the Judiciary, 99th Cong., 1st Sess. ________ (1985) (testimony of Ms. Bamberger, Mr. Boger & Mr. Yackle). Suffice it to say here that, in these instances at least, Mr. Brady concedes that the state courts were not sensitive to federal rights. They not only got it wrong; they got it "unreasonably" wrong.

Coming to the Supreme Court decisions cited by the Senator, Mr. Brady would have us believe that none of the three suggests a need for habeas--evidently because the errors in Williams and Irvin were ultimately corrected and the error in Miller might have been cognizable in habeas under S. 238. This is hardly responsive. The fact remains that in each of these cases habeas was the vehicle for detecting and curing the violation of constitutional rights. With respect to cases like Williams and Irvin, in which prisoners were finally convicted validly and sentenced to confinement, the facts do speak for themselves--just as Mr. Brady suggests. The purpose of habeas is not to mandate the release of successful petitioners in all cases, but only to ensure that a judgment which keeps a prisoner in detention be obtained by constitutionally acceptable means. These three cases illustrate the operation of habeas at its best, notwithstanding an Illinois Bar Association's conclusion that Miller was wrongly decided.

Finally under this heading, Senator Biden asked whether "precluding" federal review in habeas would not redirect prisoners to the Supreme Court, swamping the Court with certiorari petitions with which the Justices cannot possibly contend. Mr. Brady's response is revealing. He does not object to the question's assumption (that S. 238 would preclude most habeas petitions). And he seems not to be worried that the Justices might be presented with thousands of prisoner petitions. His reason is plain enough. He knows, we know, and everybody else knows that it is fanciful to think that direct review in the Supreme Court promises any realistic oversight of state criminal process. The elimination of collateral review in habeas would mean the elimination of any significant federal enforcement of federal constitutional safeguards in state criminal prosecutions.

C.

Senator Biden asked, first, whether the scope of habeas should not be wider in cases in which the reliability of the fact-finding process in state court is in question than it is in cases, like Stone, in which the application of the fourth amendment exclusionary rule is involved. Mr. Brady insists in response that S. 238 retains a larger role for the federal courts in non-exclusionary-rule cases, and, of course, he points again to the Justice Department's view that state proceedings should not be judged "full and fair" if the result reached was "unreasonable." Mr. Brady, accordingly, insists that S. 238 does not propose to extend Stone to other kinds of cases. The language of the bill belies this understanding; the enormous interpretive problems presented by the "reasonableness" standard deprive that idea of any value as a safety valve.

Second, the Senator asked whether the difference between the fourth amendment exclusionary rule, which may actually *retard* the pursuit of truth, and other procedural safeguards that serve the truth-seeking function does not explain the Supreme Court's failure to extend *Stone* on its own. Mr. Brady properly points to the Court's explanation for confining *Stone* to the fourth amendment exclusionary rule context. *Rose v. Mitchell*, 443 U.S. 545 (1979). In our view, *Stone* is not primarily a habeas case but of a piece with other cases in which the Court has pared back the exclusionary rule in various contexts. At the same time, putting *Stone* in its proper place only underscores the radicalism of S. *238.* If this is not an attempt to extend *Stone*, it is a forthright assault on the federal habeas jurisdiction.

Finally, Senator Biden asked for a comparison between the definition of "cause" in S. 238 and the Supreme Court's elaboration of that idea in the cases. Mr. Brady refers to a prior committee report and to the government's brief in *Sielaff v. Carrier*, No. 84-1554 (Sup. Ct. 1985). We have addressed the question in prior testimony. See *Hearings on S. 238, supra*. See generally Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 Iowa L. Rev. 609, 633-665 (1983); *Brief for the American Civil Liberties Union Amicus Curiae, Sielaff v. Carrier*.

LEAHY QUESTIONS

1. Noting that most habeas petitions are dismissed without a hearing, the Senator asked, first, how S. 238 would reduce the number of original petitions. In response, Mr. Brady identifies the many ways in which the bill would cut off habeas claims without regard to their substantive merit. He also points out that, under current law, district judges and magistrates must devote some time to routine processing and the question whether to hold evidentiary hearings. None of this suggests, however, that S. 238 would, if enacted, actually save federal judicial sources. Harsh as this bill is, it does not attempt to prevent prisoners from seeking relief in the federal courts; whatever the fate of individual applications for the writ, there is (and would be) no rule against filing in the first instance. Once a petition is lodged, moreover, S. 238 would only add to the threshold decisions that must be made. It is self-evident that the enforcement of the proposed statute of limitations and the determination whether previous state judgments were substantively "unreasonable" would require substantial time and effort. This bill would put the federal courts to new work--all in the misguided attempt to avoid decisions on the merits of constitutional claims.

2-6. In response to the Senator's next five questions, which asked for a reaction to recent statistics regarding habeas, Mr. Brady offers no forthright response and merely refers to earlier reports, notably P. Robinson, An Empiral Study of Federal Habeas Corpus Review of State Court Judgments (1979). Professor Robinson's work was, of course, a project of the Justice Department itself. The data in it hardly support the Department's repeated attempts to eliminate or to frustrate federal habeas. Moreover, other recent data make the case against habeas even weaker. Professor Resnick, for example, has analyzed data published by the Judicial Conference of the United States. She acknowledges that the number of habeas petitions is now higher than it once was, but she points out that the population of prison inmates has skyrocketed in the critical period:

> [B]y considering the ratio of filings to the number of people in prison, the increase in the absolute number of cases becomes less surprising. Moreover, while there has been an increase in the rate of filings per hundred prisoners since 1944, the rate of habeas filings per hundred inmates has declined since 1971. . . .

> Unquestionably the numbers indicate that over the past forty years, prisoner litigation has grown to occupy far more of the federal docket than the 1,312 cases considered burdensome in 1944. Judges are correct in perceiving that many more prisoners' cases are filed now than were filed years ago. *But the rhetoric of the boom has outlasted the reality. Even with inclusive calculations, prisoners' habeas petitions have declined, and that decline began in the early 1970's, long before the major cases and rules restricting habeas relief were in place. Habeas cases, at their peak in 1971, occupied 12.2% of a federal judge's civil docket, or 28.9 cases per judge. In 1983, habeas cases were about 5% of the civil docket.* Resnick, *Tiers*, 57 So. Calif. L. Rev. 837, 945-46, 949-50 (1984) (emphasis supplied).

Inasmuch as these habeas cases constitute the only realistic opportunity for the federal enforcement of the Bill of Rights, five per cent of federal dockets does not seem burdensome.

7. In response to Senator Leahy's point that even the absolute number of petitions decreased between 1970 and 1977 [illegible] Brady has it that the number has "steadily" increased since that time. This, again, is to misread the data. In truth, the absolute number of petitions has been fairly constant over recent years, and as Professor Resnick's work makes clear, the useful figure (number of petitions as a percentage of prisoner population) has been dropping--*steadily*.

8. In response to the Senator's request for the basis of the claim that habeas petitions are "usually filed as a means of harassing the authorities," Mr. Brady offers nothing beyond "the general familiarity of participants in the criminal justice system with the character and motivation of prisoner litigation." This is to rest a proposal to dramatically curtail the availability of the federal courts for the adjudication of constitutional claims on the speculation of wardens and prosecutors regarding the motivations of the petitioners concerned.

9. Asked whether S. 238 would have barred habeas in nine recent cases in which federal relief was warranted, Mr. Brady insists that the claims in those cases might have been considered on the theory that the state courts acted "unreasonably." We have commented previously with respect to the Justice Department's arguments in this regard. See *Hearings on S. 238 Before the Comm. on the Judiciary, 99th Cong., 1st Sess.* __________ (testimony of Mr. Yackle).

10. In response to the question whether the focus in S. 238 (or the Justice Department's explanation of the bill) would only encourage prisoners to attack the adequacy of state process rather than the correctness of state judgments, Mr. Brady refers to earlier Justice Department testimony and S. Rep. No. 226, 98th Cong., 1st Sess. (1983). We, too, have addressed this question. *Hearings on S. 238, supra*.

11. In response to the Senator's question whether federal habeas does not provide a valuable check on state power, contributing to the familiar balance of power between and among branches of government, Mr. Brady insists that habeas has nothing to do with "checks and balances" inasmuch as, in his view, the federal courts' jurisdiction in habeas is not constitutionally mandated. This is to miss the point. First, Mr. Brady neglects the possibility that *non*constitutional mechanisms can serve constitutionally-rooted allocations of power. Even if federal habeas is wholly statutory (and we do not agree that it is), the availability of the federal forum can and does foster values of constitutional significance. See, e.g., Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L. J. 1035 (1977) (describing the useful dialogue between state and federal courts made possible by postconviction habeas). Second, Mr. Brady ignores, the greater share of modern constitutional history. Whatever may have been true earlier, the reordering of

the relations between the states and the national government in the wake of the Civil War brought with it the most profound implications for the federal judiciary. The post-War amendments (particularly the fourteenth) and the flurry of legislative enactments (among them the Habeas Corpus Act of 1867) established the federal courts' special role in the protection of individual liberty against state power. The Supreme Court has recognized as much on many occasions. See, e.g., *Mitchum v. Foster*, 407 U.S. 225 (1972).

12. In response to the question whether the statute of limitations in S. 238 would not cut off claims from prisoners who committed no crime, Mr. Brady points out that factual guilt or innocence is not forthrightly at issue in habeas. While he is certainly correct in what he says, Mr. Brady neglects to acknowledge that the legal claims that very much *are* cognizable in habeas are typically in aid of correct decision-making at trial. The federal enforcement of federally-guaranteed procedural safeguards in state criminal prosecutions is, then, in service of protecting the innocent from wrongful conviction. When, for example, a habeas petitioner presents a claim that defense counsel rendered ineffective assistance in violation of the sixth amendment, the truth of the matter may be that, but for counsel's incompetent work, the petitioner would have been acquitted. A statute of limitations that bars such a claim after one year does, then, mean that a prisoner who should not have been convicted of an offense will have no judicial remedy. We concede that executive clemency may be available in the extraordinary cases Mr. Brady identifies, but nothing of that kind is likely in run-of-the-mine cases in which prisoners would be denied a federal opportunity to complain that procedural safeguards (designed to ensure sound fact-finding) were not respected in state proceedings.

13. In response to the question whether the proposed statute of limitations in S. 238 is not inconsistent with the Suspension Clause, Mr. Brady insists that the habeas jurisdiction with respect to prisoners held in state custody under state criminal judgments is entirely a creature of statute. Not only a statute of limitations, but, apparently, the outright elimination of postconviction habeas for state prisoners would be, by his account, constitutional. His reference is to the Justice Department's prior testimony, which cites several secondary authorities regarding the historical context of the Suspension Clause.

We acknowledge the view of some commentators that the Suspension Clause demands only that the Congress respect the writ as it was understood at common law. Yet that view hardly constitutes conventional wisdom. There is a vigorous debate regarding several issues touching the constitutional status of the writ--including the extent to which the Suspension Clause speaks to prisoners in state as well as federal custody and the extent to which it addresses applications from prisoners held after, as well as before, judgment. One respected commentary in point (omitted from the Justice Department's account) argues that the Suspension Clause establishes an independent, constitutional source of judicial power, such that, absent statute, both state and federal courts are obligated to entertain petitions for the writ. Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605. The Supreme Court has responded to the difficulty of these problems by avoiding any thoroughgoing explication of the Suspension Clause. E.g., *Swain v. Pressley*, 430 U.S. 372 (1977); *United States v. MacCollom*, 426 U.S. 317 (1976); *United States v. Hayman*, 342 U.S. 205 (1952). In order, however, to discourage congressional attempts to pare back the availability of habeas, the Court has occasionally dropped broad hints that the present statutory scheme has solid constitutional footing. In *Jones v. Cunningham*, 371 U.S. 236 (1963), for example, the Court flatly stated that current law "implements the *constitutional command* that the writ of habeas corpus be made available...." Id. at 238 (emphasis supplied) (footnoting the Suspension Clause). And in *Sanders v. United States*, 373 U.S. 1 (1963), the Court warned that statutory changes that "derogate from the traditional liberality of the writ... might raise *serious constitutional questions*." Id.

at 11-12 (emphasis supplied) (also footing the Suspension Clause). See also *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (*Black, J., dissenting*) (insisting that habeas corpus is "written into the Constitution" and that its use by the courts "cannot...be constitutionally abridged by Executive or by Congress"). Mr. Brady's summary dismissal of the Suspension Clause is thus wholly unwarranted. The enactment of S. 238 and its many drastic limitations on habeas would amount to playing with constitutional fire.

The statute of limitations proposed in S. 238 would not only raise serious questions under the Suspension Clause. It would deny would-be petitioners due process of law and violate their independent constitutional right of access to the courts. Cf. *Bounds v. Smith*, 430 U.S. 817 (1977) (recognizing the right). Prior testimony, ignored by Mr. Brady, explicates the full range of constitutional problems that would be presented by this bill. *Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess 192-202 (1982) (testimony of Ms. Bamberger).

14. In response to the Senator's question touching the effect of the proposal on deference to state fact-finding, Mr. Brady insists that S. 238 would only simplify present law. This is not the case at all. See *Hearings on S. 238*, *supra* (testimony of Mr. Yackle).

Mr. Brady does not respond to the Senator's further request for suggestions about amending S. 238 to clarify the distinction between questions of historical fact on the one hand, and legal or "mixed" questions on the other. We would be pleased to offer suggestions in that vein as these proceedings progress.

15. In response to questions regarding the workability of the proposed statute of limitations, Mr. Brady insists that the Senator overestimates the difficulties that might arise. We have previously elaborated the extraordinary practical problems that this proposal presents. See *Hearings on S. 238 supra.*

16. Asked whether S. 238 would cut off claims that defense counsel failed to raise in state court, Mr. Brady is quite candid. This is precisely what is intended. Habeas would be open only if counsel's behavior was so egregious as to constitute an independent violation of the individual's Sixth Amendment right to effective assistance of counsel. This extraordinary proposal, which would require habeas applicants to establish the violation of one right (the right to effective assistance) in order to be permitted to litigate another (the right that counsel failed to raise in state court), has been presented to the Supreme Court in *Brief for the United States Amicus Curiae, Sielaff v. Carrier*, No. 84-1554 (Sup. Ct. 1985). We have filed our response with the Court. *Brief for the American Civil Liberties Union Amicus Curiae, Sielaff v. Carrier*. Suffice it to say here that Mr. Brady's position would make the availability of habeas for prisoners' underlying claims beside the point. Prisoners who can demonstrate a violation of the Sixth Amendment would be entitled to habeas relief on that basis alone.

17. Mr. Brady does not here answer the Senator's request for evidence that prisoners deliberately delay their claims in hopes of avoiding retrial after a successful habeas petition. No such evidence exists, of course. It strains the imagination to think that prison inmates suffering detention in a penal institution would *choose* to postpone claims that might win their freedom. Certainly Professor Robinson's data suggest that prisoners act on the strong incentive to raise claims as quickly as they can. P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a) (1979) (reporting that petitions examined in the study were filed on the average only a year and a half after judgment in state court).

Mr. Brady complains that existing law does not permit delayed claims to be dismissed on the ground that the state would have difficulty obtaining a conviction on retrial. Yet he neglects to mention that a proposal to change Rule 9(a) to make retrial difficulty the basis for dismissal was flatly rejected only last year by the Judicial Conference Advisory Committee on Criminal Rules.

SUPPLEMENTAL STATEMENT OF JOHN BOGER

ASSISTANT COUNSEL

NAACP LEGAL DEFENSE AND EDUCATION FUND

ON BEHALF OF THE

AMERICAN CIVIL LIBERTIES UNION

REGARDING S.238

"A BILL TO REFORM PROCEDURES FOR COLLATERAL REVIEW"

In a letter to the Justice Department, dated October 23, 1985, Senator Leahy cited data showing that some form of relief was awarded in nearly 70% of the capital habeas cases decided during the six-year period ending in 1982. Asked to reconcile those data with earlier testimony indicating that federal habeas corpus has not served in recent years to correct injustices in state proceedings, Mr. Brady responds in two ways. First, he insists that the success rate in capital cases prior to 1982 was a function of uncertainty regarding capital sentencing procedures spawned by the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Mr. Brady argues that federal standards for inflicting the death penalty are now "more settled" and that, accordingly, the rate at which capital petitioners obtain federal relief will decline in the future. Second, Mr. Brady again asserts that "unreasonably" incorrect state court judgments would not bar habeas consideration of federal claims even if S. 238 were enacted. In this, he apparently means to concede that in some of the cases to which the Senator refers the state court judgments that were effectively upset in habeas *were* not only wrong, but (again) *unreasonably* wrong. And he insists that so long as particularly egregious errors in capital cases can be corrected in habeas, there is no need to retain federal review to cure less obvious violations of federal constitutional rights.

Neither of these arguments is sound. To begin, Mr. Brady offers no data of his own to demonstrate that the success rate to which the Senator refers is traceable to the *Furman* case. Habeas relief is and should be available for all manner of federal claims put by death-sentenced petitioners, whether or not related to the punishment phase of the proceedings in state court. Until Mr. Brady shows that relief was in fact awarded primarily with respect to *Furman* errors, it must be assumed that some, many, or most of the prisoners concerned obtained habeas relief on other grounds. Even accepting the complexities of *Furman* and other eighth amendment decisions as important sources of claims in habeas, Mr. Brady's point is not well taken. If, indeed, eighth amendment standards in death penalty cases give rise to many state errors that must be corrected in the federal forum, all the more reason to retain plenary review in habeas to avoid the execution of petitioners in violation of those standards. Certainly even a diminished number of such prisoners would not justify the withdrawal of habeas, and, of course, Mr. Brady has offered no hard support for his assertion that eighth amendment standards are now more easily identified and applied than they were three years ago. The number of death penalty cases now being processed in the federal court system belies any such conjecture.

In this vein, it is critical that the Committee should understand that the lower federal courts sitting in habeas provide the systems primary mechanism for ensuring both that ordinary federal procedural safeguards are observed in state death penalty cases and that the Supreme Court's elaborate sentencing guidelines for capital cases are understood and enforced. The Justices quite clearly depend upon the habeas courts to make *Furman* and other decisions effective. Were it not for habeas, and the concomitant promise of federal superintendence of the infliction of death, the very integrity of current eighth amendment standards in this field would be called into question. Said another way, the Court has thus far held that capital punishment can be carried out consistent with federal law--but only against the background of the availability of the habeas courts to ensure respect for necessarily elaborate, constitutionally-rooted procedures.

The Senator asked, in addition, whether the statute of limitations proposed in S. 238 would not work particularly harsh consequences in cases, many involving death sentences, in which early federal petitions are unlikely. Mr. Brady responds that the exceptions allowed in S. 238 would accommodate cases in which later review is appropriate. In this, Mr. Brady neglects points that we and others have made in the past with respect to a statute that cuts off federal review without regard to the merit of federal claims. *Hearings on S. 238 Before the Comm. on the Judiciary, 99th Cong., 1st Sess.* ______ (1985)(testimony of Ms. Bamberger and Mr. Yackle).

The Chairman. Senator Grassley, I thank you very much for taking over.

Senator Grassley [presiding]. Mr. Chairman, at this point, I am going to insert a statement in the record. My reason for being late is similar to what the chairman's was, because of the caucus on the debt ceiling.

The questions that I was going to ask have already been asked, and I would request unanimous consent that we put a statement in the record by Senator McConnell; also, a statement by Senator DeConcini.

[Statements follow:]

Opening Statement by Senator Charles E. Grassley

Mr. Chairman, I want to commend you for holding today's hearing on S. 238, which reforms Federal habeas corpus procedures.

Originally, the habeas corpus petition, or the "great writ", was used only to review the legality of executive detentions. However, over the years, the petition's use has been expanded to include lower Federal court review of State criminal judgments.

The expanded scope of Federal habeas corpus has often led to the filing of meritless or repetitive claims, which has created friction between State and Federal courts as well as unnecessary burdens on the entire judicial system. The petition has been criticized by a majority of the justices of the Supreme Court, and Chief Justice Burger has called on Congress to consider restricting the availability of the "great writ".

The bill before us is a fair and reasonable response to the problem, by establishing a more appropriate scope for the petition without injuring basic constitutional rights. Among its provisions, S. 238, would avoid duplicative litigation by denying relief to claims that have been fully and fairly adjudicated in State proceedings, or that have not been properly raised in State proceedings, given the opportunity to do so. Additional provisions, such as a 1 year statute of limitation for filing habeas corpus petitions by State prisoners, would also further the objective of legitimately streamlining the presently overburdened, and poorly functioning judicial system.

I looked forward to working with this committee on finding solutions to the problems in our criminal justice system. I believe S. 238 is one of those solutions, and I look forward to its passage.

Thank you Mr. Chairman.

Opening Statement of Senator Mitch McConnell

Mr. Chairman, I commend you for holding this hearing on S. 238, just as you held hearings in prior Congresses. This is an important bill, one that I believe will introduce a needed element of order into a field that at present seems to be marked more by disarray than anything else.

There is perhaps nothing more important to our society than the confidence of our citizenry in the judicial system, and in the rule of law after careful application of due process to effect substantive rights. Yet increasingly, the public has come to be exasperated with the constant stories of delays in the criminal justice system, and of seemingly endless review of criminal defendants' convictions. The nearly endless pattern of habeas corpus petitions, raising a single error, followed by review in district court, dismissal, and the filing of another petition, continues to undermine the faith our society places in the system.

Moreover, it puts ever increasing strains on the ability of our judicial system to provide for the orderly and prompt resolution of not only habeas petitions, but also of other criminal and civil matters. The burden on the system seems also to be balanced by no particular benefit, for little case can be made that the repetition of habeas petitions is essential to the execution of justice. Indeed, by far the majority of such petitions raise alleged errors that existed at the time of sentence, and certainly at the time that the initial petition was filed. Thus, no protection of constitutional magnitude is lost by requiring that all alleged errors be brought in one petition.

Nor is any particular protection lost by refusing to review judgments of State courts if the defendant has failed to exhaust his State court remedies. Our State court systems have proven themselves to be capable defenders of constitutional rights, and the reforms proposed in this bill have much to recommend them.

I commend you, Mr. Chairman, for bringing this issue to the committee and to the forefront of the Senate. I look forward to the testimony of the witnesses, and thank you, Mr. Chairman.

OPENING STATEMENT OF DENNIS DECONCINI

Mr. Chairman, I want to thank you for holding these hearings and commend you on your continuing efforts to reform our criminal laws and laws for criminal procedure. I, too, am very concerned with the present state of our habeas corpus laws. That is why I am very pleased to cosponsor this bill to reform procedures for collateral review of criminal judgments.

I first want to say that I am firmly committed to the enforcement and protection of Federal rights, including the Federal rights of criminal defendants in State proceedings. However, I believe that presently the availability of Federal habeas corpus as a means of review of State criminal convictions is much too expansive.

Historically, the purpose of the writ of habeas corpus was to ensure the availability of a means for securing judicial review of the legality of a person's detention. Unfortunately, in recent years I believe the procedural safeguards attached to the writ have been abused and have become instruments with which to frustrate justice rather than secure it.

I believe that S. 238 is a bill that will correct the abuses of the present habeas corpus laws and will restore the public's confidence in the criminal justice system. S. 238 makes vital improvements in our present laws that all too often result in uncertainty and in needless delays in the finality of constitutionally sound criminal judgments.

In sum, I believe S. 238 will produce a system that affords a more appropriate recognition to the dignity and independent stature of State courts. It will establish appropriate standards of review in habeas corpus proceedings, according deference to the results of State adjudications that are full and fair. It will also serve the needs and objectives of criminal justice, and create a lesser burden for both State and Federal criminal justice systems. Moreover, it will do so without sacrificing fairness to criminal defendants or jeopardizing the protection of individual and constitutional rights.

Senator **GRASSLEY**. Let me clear with staff—I would imagine that is all the business—right?

I thank the panel for your kind attendance, your patience, and I state that the meeting is adjourned.

Thank you.

[Whereupon, at 10:37 a.m., the committee was adjourned.]

APPENDIX

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Professor Anthony G. Amsterdam

October 2, 1985

Honorable Strom Thurmond
Honorable Joseph Biden
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

re: S. 238 -- "A Bill to Reform Procedures for Collateral Review of Criminal Judgments" (1985)

Dear Senators Thurmond and Biden:

I recently learned that the Senate Committee on the Judiciary will be holding hearings on S. 238 on October 9, 1985. Although S. 238 describes itself as a bill to "reform procedures" in collateral-review proceedings, it contains a provision that would in fact repeal the substance of the federal habeas corpus jurisdiction enacted by Congress in 1867, which has since become a mainstay of our federalism. If passed, this provision would make the most drastic revision of the judicial system for enforcing constitutional rights that any Act of Congress has made since Reconstruction. It would rip up the legislative record of the past twenty-eight years, during which the Congress has repeatedly been asked, and has repeatedly refused, to eviscerate federal habeas corpus in this manner. Proposed legislation of such an extraordinary nature -- inconsistent with the judgment of Congress after Congress, and destructive of a jurisdiction that the federal courts have had for almost 120 years -- demands the most thorough critical scrutiny.

I hope that the hearings will focus particularly upon section 5(b) of S. 238 [page 6, lines 8 - 11], which would add a new subsection (d) to 28 U.S.C. § 2254, providing:

> "(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings."

This is by no means the only seriously questionable provision of the bill, but it is the most dangerous among them. Its purpose is admittedly to "repeal" the long-settled "rule requiring routine redetermination by Federal Courts of legal and mixed legal-factual determinations of State Courts." [128 Cong. Rec. S265 (daily ed., February 2, 1982)(remarks of Hon. William French Smith, Attorney General of the United States, on S. 2216, the predecessor bill to S. 238).]

Please notice exactly what this subsection does:

(1) It forecloses federal habeas corpus relief for *concededly valid* claims of federal constitutional violations which the state courts have erroneously rejected. If a federal habeas corpus petitioner's claim is *in*valid -- if the state courts have *correctly* rejected his or her contention of unconstitutional imprisonment -- then of course the petitioner will be denied federal habeas corpus relief *on the merits* under present law, and new subsection 2254(d) is superfluous. Its bite comes in the case of a prisoner with a *just* constitutional grievance, to whom the new subsection says: *You are perfectly right that you are in prison in violation of the Constitution of the United States, but you must stay there because the federal habeas corpus courts are forbidden to remedy the violation.*

(2) The scope of this prohibition embraces valid constitutional claims of every kind and consequence. No matter how fundamental the constitutional right involved, no matter how plain the violation of that right, no matter how egregiously incorrect the state court's condoning of the violation, no matter whether or not the resulting conviction was subjected to state appellate review, no matter how unfair the conviction or innocent the prisoner, he or she must remain unconstitutionally imprisoned.

Before coming to examine the wisdom of this provision, let me first point out the extent of its deviation from principles which Congress has endorsed for more than a century. The Habeas Corpus Act of 1867 [Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385], which is now codified with amendments in 28 U.S.C. §§ 2241 - 2254, was designed by Congress to bring "within the *habeas corpus* jurisdiction of every [federal] court and of every *[federal]* judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws." *Ex parte McCardle*, 73 U.S. [6 Wall.] 318, 325 - 326 (1867). See Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. CIV. RTS. - CIV. LIB. L. REV. 579 (1982). The reason for Congress' proclaimed intention to make the Act "a bill of the largest liberty," available to "enforce the liberty of all persons" [Cong. Globe, 39th Cong., 1st Sess. 4151 (Rep. Lawrence, July 25, 1866)] is not difficult to discern. At a time when federal and state legislatures were engaged in proposing and ratifying the Thirteenth, Fourteenth, and Fifteenth Amendments, it was clear to Congress that the fundamental rights created by these charters would be meaningless in the absence of appropriate mechanisms for their enforcement. See generally Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 805 - 828 (1965); Peller, *supra*, at 618 - 620. In the case of the most basic right of all -- the right not to be imprisoned in violation of the Law of the Land -- the obvious mechanism available, and adopted by Congress, was the writ of habeas corpus, called by Blackstone "the great and efficacious writ, in all manners of illegal confinement," whose codification by Parliament in 1679 was "frequently considered as another *magna carta* of the kingdom." 3 W. BLACKSTONE, COMMENTARIES 129, 135 (6th ed., Dublin 1775). Mr. Justice Clark summed it up in more contemporary language in 1961:

> "Ever since the Magna Charta, man's greatest right -- personal liberty -- has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its 'privilege . . . shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' Art. I, §9. Its principle is imbedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity

> of their detention. Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' Bowen v. Johnston, 306 U.S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution."

Smith v. Bennett, 365 U.S. 708, 712-713 (1961). See generally Chafee, The Most Important Human Right in the Constitution, 32 B.U.L. REV. 143 (1952).

Despite several recodifications and amendments of the Act since 1867, Congress has never departed from the recognition that a federal habeas corpus remedy as broad as the rights conferred by the federal Constitution is indispensable to the effective realization of those rights. Prior to 1976, the Supreme Court deviated from that recognition only once. The case is tragic and instructive, very much to the point today. For this single lapse in the protective function of the federal habeas corpus jurisdiction is the historical model for section 5(b) of S. 238; and it tells us with unique clarity precisely what the enactment of S. 238 would permit.

In 1915, the Supreme Court denied habeas corpus relief to Leo M. Frank, a Jewish man convicted and sentenced to die for raping and killing a young Christian woman in Atlanta, Georgia. Frank v. Mangum, 237 U.S. 309 (1915). The record before the Supreme Court left it no choice but to assume, as Justice Holmes wrote in dissent, that Mr. Frank's trial in the local Georgia court was "dominated" by an anti-semitic "mob", which, for example, had forced the trial judge to order "not only the petitioner [Mr. Frank] but his counsel to be absent from the court" during critical portions of the trial in order to avoid the "'probable danger of violence.'" Id. at 346 - 47. Recent revelations indicate that the mob-dominated atmosphere surrounding Leo Frank's arrest and trial prevented an eyewitness to the murder from coming forward and establishing that Frank was completely innocent. See Rawls, After 69 Years of Silence, Lynching Victim is Cleared, N.Y. Times, March 8, 1982, p. A12.

Because Georgia had accorded Mr. Frank the potential "corrective process" of an appeal, a majority of the Supreme Court denied him federal habeas corpus relief. The majority held that he was not even entitled to a hearing at which he might have proved that he had been falsely convicted without due process, under what amounted to "lynch law . . . practised by a regularly drawn jury" (237 U.S. at 350 (Justice Holmes, dissenting)). Finding that Mr. Frank had the opportunity to, and did, appeal his "mob domination" claim to the Supreme Court of Georgia, and that that court, "upon a full review, decided appellant's allegations . . . to be unfounded," the Supreme Court majority concluded that Mr. Frank's constitutional claim could not be relitigated in habeas corpus proceedings, regardless of its merit. Id. at 355. (Not long after the Supreme Court's ruling, Mr. Frank was seized from jail by a lynch mob and hanged.)

Justice Holmes dissented, arguing that, as always theretofore understood, the federal courts' "power to secure fundamental rights" through the Habeas Corpus Act of 1867 "becomes a duty" once "resort to the local tribunal . . . has been had in vain." Id. at 348 - 349. Eight years later, the full Court restored that interpretation, which had prevailed prior to Frank. See Peller, supra, at 610 - 643.

In Moore v. Dempsey, 261 U.S. 86 (1923), five black men sought habeas corpus relief in federal court after being convicted and sentenced to die by an Arkansas jury for killing a white man during an attack by a group of white vigilantes on a church meeting held by a group of blacks. The petitioners alleged that a "mob spirit" prevailed during the convening of the grand jury as well as during the trial. Again in the words of Justice Holmes, this time writing for the majority:

> "On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury--blacks being systematicaly excluded . . . . The counsel . . . had had no preliminary consultation with the accused [and] called no witnesses for the defence although they could have been produced . . . . The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree . . . . [T]here never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County . . . ."

Id. at 89. Although, as in Frank, the five petitioners had been afforded an appeal to the state supreme court, the Moore Court concluded--contrary to Frank--that "perfection in the machinery for correction" could not "prevent this Court from securing to the petitioners their constitutional rights." Id. at 91. As Justice Black wrote thirty years later, "Moore v. Dempsey . . . stand[s] . . . for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution . . . . Perhaps there is no more exalted judicial function." Brown v. Allen, 344 U.S. 443, 554 (1953). And, as Justice Frankfurter wrote, "the prior State determination of a claim under the United States Constitution cannot foreclose [federal habeas corpus] consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have." Id. at 500. See Townsend v. Sain, 372 U.S. 293, 318 (1963). */

Thus the law stood until 1976. The Supreme Court's decision that year in Stone v. Powell, 428 U.S. 465, marked the first time since Frank, and the second time in the entire history of the Court, that the Habeas Corpus Act of 1867 was interpreted to provide relief for less than all constitutional claims. I myself believe that insofar as Stone foreclosed federal habeas corpus relief for search-and-seizure claims it was not only a lawless decision but one that is destructive both of effective law-enforcement efforts and of the basic fabric of constitutional government.

Stone is destructive of law-enforcement efforts because it tells convicted offenders -- most of whom will be returned to the streets of society some day -- that the federal courts put so little value on their just and valid constitutional grievances that they will not bother to enforce them. The bitterness, the

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*/ Townsend v. Sain, as codified in 28 U.S.C. ¶ 2254(d), did, of course, permit federal judges to defer to certain factual determinations by the state courts, while retaining the rule that they "may not defer to [the state courts'] findings of law. It is the district court's duty to apply the applicable federal law to the state court fact findings independently." 372 U.S. at 318. In support of S. 238's proposed foreclosure of questions of federal constitutional law as well as questions of fact, the Attorney General argued to your Committee (on the predecessor bill, S. 2216) that Brown v. Allen and Townsend v. Sain created "a somewhat odd contrast between redetermination of factual issues and redetermination of legal issues," which Section 5(b) is designed to repeal. 128 Cong. Rec. S265 (daily ed., February 2, 1982). The "disparate treatment of the re-examination of factual and legal issues" by reviewing courts, ibid., was not created by Brown v. Allen and Townsend v. Sain, nor is it at all odd. The distinction prevades our legal system. E.g., Fed. R. Civ. Pro. 52(a); United States v. Yellow Cab Co., 338 U.S. 338 (1949); Anderson v. City of Bessemer City, 105 Sup. Ct. 1504 (1985).

feeling of being wronged rather than of being treated fairly for one's own wrongs, which must flow from such a message is intolerably dangerous. I cannot imagine anything more frightening than giving criminal offenders whom the peno-correctional system is trying to rehabilitate and restore, this cause for a just and festering grievance against society and law.

Stone is destructive of basic constitutional values because it ignores the critical point once made by Felix Frankfurter -- a Justice who knew the difference between long-range effectiveness and short-sighted expediency in the methods chosen by a democratic society to deal with crime: "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; [and] a democratic government must therefore practice fairness." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion). If one adopts this view, there is no basic conflict between effective law enforcement and the enforcement of constitutional rights and values. Rather, the two go hand in hand. By abandoning fairness and the enforcement of constitutional safeguards in the criminal process, *Stone* takes a giant step toward stripping law of the legitimacy that it must have in order to command the obedience of a free people.

Nevertheless, *Stone* has been accepted by many reasonable individuals because of its narrow and specific focus: because the particular constitutional rule which it refused to enforce through federal habeas corpus -- the exclusionary rule in search-and-seizure cases -- is itself thought to be a technicality that defeats the ends of justice. *Stone*'s acceptance now makes it respectable, although disingenuous, to point to that case as a model for section 5(b) of S. 238. [See the Section By Section Analysis of S. 2216 appended to the March 3, 1982, submission by Hon. William French Smith to the President of the Senate, at pp. 36 - 37.]

But make no mistake about it. Section 5(b), unlike *Stone*, is *not* limited to search-and-seizure claims. It extends to every claim of federal constitutional violation. The Supreme Court has explicitly refused to stretch *Stone* that far. *Jackson* v. *Virginia*, 443 U.S. 307, 321 - 324 (1979); *Rose* v. *Mitchell*, 443 U.S. 545, 559 - 564 (1979). S. 238 would, for example, strip the federal courts of power to provide relief against convictions and sentences secured by state agents' suppression of exculpatory evidence (see, *e.g.*, *Freeman* v. *Georgia*, 599 F.2d 65 (5th Cir. 1979)) or fabrication of incriminatory evidence (see, *e.g.*, *Miller* v. *Pate*, 386 U.S. 1 (1967)); by the physical and psychological coercion of confessions (see, *e.g.*, *Reck* v. *Pate*, 367 U.S. 433 (1961); *Jurek* v. *Estelle*, 623 F.2d 929 (5th Cir. 1980)(*en banc*); *United States ex rel. Adams* v. *Bensinger*, 507 F.2d 390 (7th Cir. 1974)); by jury instructions that place the burden of proving innocence upon the defendant (see, *e.g.*, *Francis* v. *Franklin*, 105 Sup. Ct. 1965 (1985)); by empaneling juries so saturated with prejudice that they have decided the defendant's guilt before the trial begins (see *e.g.*, *Irvin* v. *Dowd*, 366 U.S. 717 (1961)); by the denial of requested counsel (see, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387 (1977); *United States ex rel. Sanders* v. *Rowe*, 460 F. Supp. 1128 (N.D. Ill. 1978)); and by the provision of counsel as ineffective as the one appointed in *Moore* v. *Dempsey* (see, *e.g.*, *Young* v. *Zant*, 677 F.2d 792 (11th Cir. 1982); *House* v. *Balkcom*, 725 F.2d 608 (11th Cir. 1984); *Jones* v. *Mabry*, 476 F. Supp. 311 (E.D. Ark. 1979)).

Such violations of the Constitution, like those in Leo Frank's case, cannot be dismissed as involving mere technicalities. "The history of liberty has largely been the history of the observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347 (1943). "[T]he Due Process Clause [has the] . . . historic function of assuring appropriate procedure before liberty is curtailed or life is taken. We are deeply mindful of the anguishing problems which the incidence of crime presents to the States. But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case. . . . Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of justice at once rational and effective." *Watts* v. *Indiana*, 338 U.S. 49, 55 (1949) (plurality opinion).

So S. 238 cannot fairly be considered a Stone v. Powell Bill, even if one approves of Stone. As a Stone v. Powell Bill, it would, of course, be quite unnecessary: Stone is already the law. Instead, S. 238 is a Leo M. Frank Bill -- a bill to make the discredited rule and the barbaric result of Frank v. Mangum the law of the United States.

Yet the need for an effective federal habeas corpus jurisdiction to remedy denials of federal constitutional rights is no less today than it was in the days of Leo Frank. Just this year, for example, a unanimous Court of Appeals for the Eleventh Circuit granted habeas corpus relief to a black Alabama woman whose conviction of "voting fraud" had been upheld by the state courts on no other evidence than that she participated in legitimate efforts to assist elderly black citizens of Pickens County, Alabama, to exercise their right to vote. A federal district judge in the Middle District of Alabama reviewed the record and held that the prosecution had utterly failed to meet its constitutional burden of proof that her activities on behalf of these elderly black voters constituted any crime; and the Court of Appeals affirmed the judgment that her conviction was unfounded and should be set aside. Bozeman v. Lambert, 11th Cir. No. 84-7286 (May 6, 1985)(per curiam).

At the hearings of October 9, I hope the Committee will insist upon a demonstration by the proponents of S. 238 that there is a compelling justification for shutting the doors of the federal courts to cases such as this one. If, as the proponents assert, there are some abuses of the federal habeas corpus jurisdiction, surely such abuses can be corrected by more appropriate legislation than a blunderbuss court-closing provision like section 5(b). Alternatives that do not throw out the baby with the bath should be explored. More fundamentally, the questions should be explored whether the claimed abuses are real at all, and whether, if they are real, the frequency of their occurrence presents an evil that outweighs the need persisting today -- whose dimensions also should be thoroughly explored -- for providing federal habeas corpus relief where a state-court remedy, "though adequate in theory, [is] . . . not available in practice."**/ I urge that the Committee on the

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**/ Monroe v. Pape, 365 U.S. 167, 174 (1961). See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166 (1969) ("it is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts"). This recognition is not new. As Alexander Hamilton wrote in The Federalist:

> "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the states would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."

THE FEDERALIST, No. 81, at 510 (A. Hamilton)(B. Wright ed. 1961). Nor is it obsolete today. In a recent review of state corrective processes in Tennessee, for example, the author concluded that "federal habeas corpus relief . . . continue[s] to be needed" because almost no relief has in fact been forthcoming from the facially full and fair corrective processes available in that State. Anderson, Post-Conviction Relief in Tennessee--Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act, 48 TENN. L. REV. 605 (1981).

Judiciary consider these questions fully at its hearings on S. 238.

Thank you very much for your willingness to receive my thinking on this important bill. I would appreciate it greatly if my letter could be read into the record.

Sincerely,

Anthony G. Amsterdam
Professor of Law
Director of Clinical Programs
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